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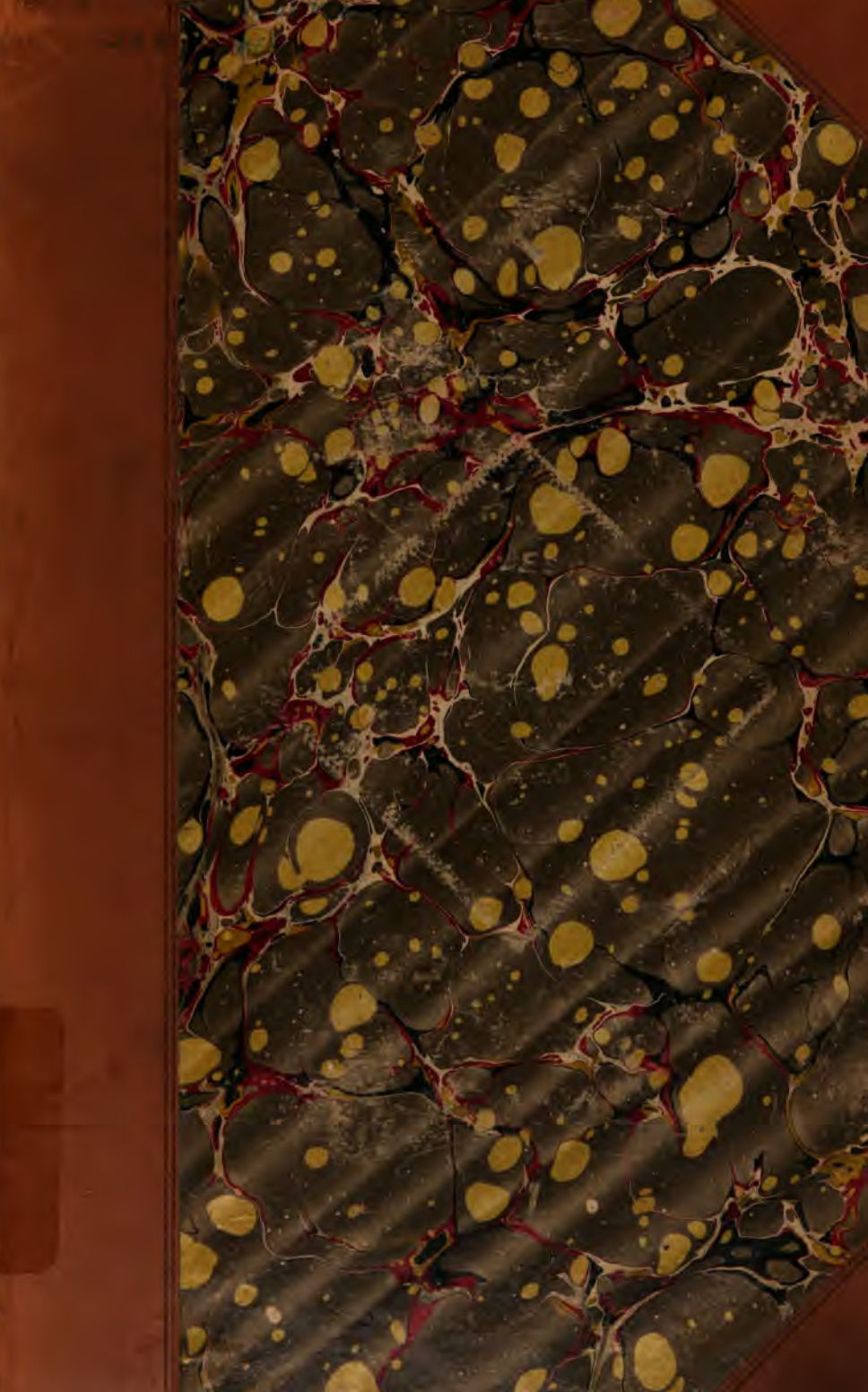
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THE
LAW REVIEW.

ART. I.—THE IRISH BAR A FEW YEARS AFTER
THE UNION.

“And Swift cried wisely — *Vive la bagatelle.*”

THE generation of the Irish Bar, of which Lord Plunket is almost the sole remaining relic, deserves some memorial. The Union, when it closed the doors of a native parliament, effected a complete change in the character of the profession. That learned body is now no more like what it was, forty years ago, than the squires of the present day are like those of Castle Rack Rent. The legacies bequeathed to the existing generation, by their hunting, drinking, rent-anticipating progenitors, in the shape of mortgages, have almost extinguished all the fun and fire of the squirarchy. The morning of whisky, the noon of duelling, and the night of claret, those glorious times when Irish gentlemen reflecting, as Sir Boyle Roche said, “that posterity had done nothing for them” were determined in return *to do* for their posterity — and kept their word with a vengeance, — are passed away, and days of reckoning have succeeded: days, albeit, though days of reckoning, not to be marked with chalk, but charcoal, never even dreamt of in Ireland till the “accursed” Union taught debtors that they must pay, and tenants that they might live. The then Bar partook, as might be expected, very much of the character of the gentry. Enjoyment of the present, defiance of the future, constituted its characteristics.

Law, with most of its members, was by no means a primary consideration. Of course, there were exceptions, and shining ones; but we speak of the rule. Even where knowledge was possessed, it was not always very safe to make use of it. To demur to a declaration was deemed the height of incivility, a grave personal provocation; and the graver, because it was obviously deliberate. Zeal was made to atone for want of learning. Each man became the representative of his brief, to gainsay any one invention in which the holder was to resent as highly unprofessional. Barrington has by no means exaggerated the belligerent propensities of his brethren. The reports most in vogue were those of the pistol. Every *gentleman* was expected to fight one duel at the very least. It was a legal diploma. Curran fought four. Had matters even gone to extremity in our own day, Mr. Smith might have pleaded precedent. Lord Clare fought when he was attorney-general. Indeed, Toler's promotion turned the Common Pleas into a kind of court of honour, the noble chief priding himself on his chivalry; and often, more than hinting, from the Bench, that he was no longer a judge than while he sat on it. It was a favourite boast of his that, "he began the world with fifty pounds and a pair of hair-trigger pistols." They served his purpose well. A well-timed challenge to Napper Tandy, one of the mushroom demagogues, in which Ireland is so prolific, was understood mainly to have contributed to his elevation. When Fitzgibbon, the then chancellor, was apprised of the intention, he at once exclaimed, "Make him a bishop—make him an archbishop—any thing but a Chief Justice." The luck, however, of the hair-triggers triumphed, and Toler died not merely a Chief Justice, but the founder of two peerages, and the testator of an enormous fortune.

Despite of many drawbacks, Norbury was a very extraordinary man. Short and pursy, with grey, laughing eyes, he had the singular habit of puffing out his cheeks between his sentences. To a thorough knowledge of the world, he added, what perhaps that very knowledge would create, as thorough a contempt for it. The conventional gravity of the judgment-seat was put to flight by such expressions as,—

"Come, Mr. Everard, *mur* your demurrer;" and of course his Court adopted its chief's example. It could not well be otherwise. His very laugh was infectious. A stranger passing through the Hall, could at any time have distinguished the Common Pleas by the incessant merriment which issued from its portals. Of that Court at Nisi Prius, particularly in summer, it is difficult to convey an adequate description. As a matter of course, it was always crowded to the very ceiling, with an atmosphere to match. In this, above all things, Norbury delighted, with the exception of the heat. There he was in his glory, good humour personified, puffing, and punning, and panting, till his face became a full moon. At last, grilled beyond endurance, off went the gown, and the tails of the wig reversed, hung over his forehead. But suffer as he might, there was about him a blandness which it was impossible to ruffle. He was often severely tried. Amongst the many portents which distinguished his Court, was a poor monomaniac, whose delusion was that *he* was the Chief Justice. Long and good-naturedly was he tolerated, till, when at last he threatened to depose the impostor from the Bench, the tardy mandate might be heard, "Jackson, turn Lord Norbury out of Court." A non-suit was never heard of in his time. Some people gave a reason for it; Norbury gave another, rather different, but less serious. "As a *constitutional* judge he would not take a case from the jury." "I hope, my lord," said counsel (in a case actually commanding it), "your lordship will, for once, have the courage to nonsuit." In a moment the hair-triggers were summoned. "Courage—I tell you what, Mr. Wallace, there are two kinds of courage—courage to *shoot* and courage to non-shoot, and I hope I have both,—but non-shoot I certainly will not;" and no possible argument could induce him. He was an inveterate punster, and a first-rate one, too, if, according to Swift, the worst are the best. Bitter things, however, at times he said, and things to be remembered. There was a gentleman of high rank once tried before him for arson. He was acquitted—not, however, by the verdict of the mob who, in defiance of the jury, called his house "Moscow." The first place in which Norbury and he met

after trial, was at a levee. "How do you do, my lord?" "How do—how do—glad to meet you *here*." "Paying my farewell visit as a bachelor, my lord, I'm going to become a Benedict." "Glad to hear it, Mr. C. Saint Paul says, you know, better marry *than burn*."

It is singular enough that, with good humour ever in his looks, and merriment also ever on his lips, this man's nature was obdurate and callous. He had no sympathy for human suffering, no feeling even for himself. He valued not his life at a pin's fee, and it was as dangerous as it was difficult to provoke him. His friends knew this, and the fact gave rise to an incident in which his shrewdness and determination blended humorously. Towards the close of life, when the failure of his faculties became manifest, the then viceroy, the Marquis Wellesley, decided on giving him a hint to resign, through the well-known under-secretary, Mr. Gregory. Norbury got scent of it, and instantly was his decision taken. He sent for Gregory, led him to his library, and, as he turned the key, assumed that fiery scowl with which Gregory was familiar as portending mischief. "Gregory, I have long looked on you as my oldest friend, and severely now am I about to test that friendship. The most momentous incident of my life is at hand; I am about to be publicly and grossly insulted,—I, who never brooked even a saucy look from any one! Will you believe it, Gregory, our mock-king at the castle is actually meditating a message to me to resign my office! Did you ever hear of such audacity! such poltroonry too! Of course the fellow won't fight. But my mind's made up, his ruffian messenger shall have my life, or never return with his own — no — not though he was my brother. Gregory, my old and valued friend, will you stand by me? The hair-triggers are as ready as in the days of Napper Taudy." That very day the private closet of the castle saw the horror-stricken Gregory most respectfully declining the confidential mission. The blow, thus for the time averted, came at last. It came, however, in writing. All Norbury asked, was a postponement, till he could consult a friend. The promise being given — the friend was in India — and — a year was gained. At last, however, falling asleep on the

Bench during a trial for murder, a petition to parliament compelled his resignation. His last act was characteristic. He had for his neighbour an old nobleman who had been bedridden for years. Hearing from his physician, that, though he himself was in no immediate danger, still in all probability he would never rise from his bed, he very deliberately rung the bell for his servant: — “James, go next door, and tell Lord Erne, with my compliments, that it’s now a *dead-heat* between us.” When he was not on the bench, he was on horse-back.

One of his brethren in the Common Pleas, deserves a passing notice. In truth, Mr. Justice Fletcher was, in his own way, almost as great an original as his chief. A good lawyer, for the time in which he lived, and, what is good in all times, a very humane judge: but, a bear’s skin disguised a kindly nature; uncouth in manner, and independent in principle, he cared neither what he said, nor whom he encountered. The ultra-liberalism of his celebrated Charge to the Wexford Grand Jury threw the whole country into a flame, and well nigh drew down on him the vengeance of Government. By way of propitiating them, he revised, strengthened, and published it as a pamphlet. The surliness of his manner produced a *mot* from Mr. French, which should not be forgotten. About five o’clock every day Fletcher became ravenously hungry; the peasantry said he had a wolf in his stomach. One day, just on the advent of the hungry hour, French commenced a long cross-examination; sundry and wryful were the contortions of Fletcher, and dogged in proportion the pertinacity of French. At length the hour of six sounded audibly. Flesh and blood — at all events, flesh and blood like Fletcher’s — could stand it no longer, the outburst came: — “Lord of heaven Mr. French, do you mean to keep me here all night, like a bear tied to a stake?” “Oh, no, my lord,” said French, bowing reverentially, “*not tied to a stake.*” In allusion to this failing, Bushe used humorously to describe Fletcher, when previously pacified by substantial, as *amusing* himself by “playing on an eel,” the process being his taking the head in one hand and the tail in the other, and then, Pandean fashion, running the body through

his teeth! No two men could possibly be more dissimilar than these ermined brethren. Fletcher, humane, learned, and uncourteous, — Norbury, shallow, good-humoured, and severe. The one all sincerity, meaning what he said. The other all surface, meaning nothing at all. The Chief Justice was the most hospitable man in the most hospitable of countries, — that is, so far as *invitations* went. He *invited* every one to his country-house, and the duration of the visit conferred an obligation in proportion to its length. The invitations were all to the country, the town-house being inconveniently near. There was a ludicrous story rife in those days of a simple old couple who actually believed that the “When will you kindly spend a week with me in the country?” meant what it expressed. Packing up, therefore, the requisites for a week, they innocently presented themselves at the country-house. The hospitable inviter, but most unintentional host, received them with amazement, but with his usual self-possession. His presence of mind quailed not at the lady’s maid and the bandboxes, and the heavy imperial and all the manifest indications of a protracted sojourn. On the contrary, he sprang forward, his whole person mantled in affability, — “My kind friends — my dear old friends — this is so like you — so very good of you; now, no excuses, I must positively insist on your — *staying to dinner*.” When some burglars subsequently paid the “country-house” a visit, the jest went that it was “by a general invitation.”

The Court of Common Pleas presented a grand spectacle on what was then called one of its “field-days” at Nisi Prius. Every avenue was crowded long before it opened, and when it did, awful was the uproar! Aloft sat Norbury, with the glow of Bacchus and the cheeks of Æolus, immediately below him his *fidus Achates*, Jackson; and right opposite, the two regular gladiators of the place, Tom Goold and Harry Grady. Ah, these were days, indeed, as Madame Junot calls those of the empire. Tom Goold and Harry Grady were racy originals; and, like Fletcher and Norbury, human antipodes! Goold was a little man, all airs and graces, exquisitely fastidious, a master of every thing, judice Tom; and, taking his finish and his attainments together, rated himself somewhere between a

Crichton and a Chesterfield ! He sang, he danced, he argued, he rode, he declaimed, he even brushed his hat better than any body in the world ! Harmless vanity, counterpoised by a thousand sterling qualities. An excellent Nisi Prius fencer, he rose at times to a high order of eloquence. A pamphlet, published by him in early life, in answer to Burke's celebrated "Reflections," attracted the notice of that great man, and procured him the distinction of an invitation to Beaconsfield. Had Goold been contented with the world's estimate of him as he really was, all would have admitted him to be an eminent man. But he sharpened censure, and at times excited ridicule, by aspiring to be, what no man ever was, in every art, trade, science, profession, and accomplishment under the sun — a *ne plus ultra*. This foible was carried to a pitch almost incredible. Expatiating one day on the risk he ran from a sudden rise of the tide, when riding on the north strand, near Dublin, he assured his hearer, "had he not been the very *best horseman* in existence, he must inevitably have been drowned — in short, never was human being in such danger." "My dear Tom," his friend answered, "there unquestionably was one in greater, for the poor man *was* drowned there that very morning." "By heavens, sir," thundered out Goold, "I might have been drowned, if I *chose* !"

Such was the man upon whose harmless eccentricities Harry Grady delighted to practise ; and in Munden's prime, broader farce was never witnessed. Grady was like Goold in stature, but of clumsier formation. To a rich fund of Irish fun and constitutional vivacity he added at times a vulgarity not his own, for the sole purpose of shocking his antagonist. It was a most amusing thing to see Goold recoiling from what he manifestly considered the humiliation of such a contact. His face looked horror—his fastidiousness was in convulsions, and his agitated dignity truly ludicrous, as he affected alternately to despise and disdain what he could not avoid enduring. All would not do. The ground and lofty tumbling was irresistible. Grady actually seemed to revel in drollery. The broad jest and eternal chuckle now disgusted, and now distracted Goold. But, poor man, what was he to do ? If he politely remonstrated, Grady blandly

told him "his relief was in equity." If he turned to the Bar, the titter was but suppressed,—if to the gallery, they were all in a roar,—and, if in his despair he looked up to the Bench, there he saw Norbury rolling to and fro, his face radiant with undisguised delight. It was on such occasions that the late excellent Doctor Shepherd, of Gateacre, used to excuse himself for frequenting the Irish Common Pleas, on the humorous ground that "his profession withheld him from the theatre, and he was *very fond of farce*." Goold possessed powers of eloquence to which Grady knew he could not aspire, and his sound common sense forbade the ambition. But he was not wanting in a counterpoise. Upon features capable of the most comic expression, he performed a running accompaniment to the other's sublimities. When Goold was in the clouds, Grady cut capers on the earth, to which gravity was a stranger. Often enough when Tom soared highest was he horror-stricken at the roar with which the pantomime of which he was unconscious, checked his flight. One of Grady's most efficient weapons was his *right eye*! By the mere dint of winking it seemed much smaller than the left one, and so much did he rely on it that he thus one day accounted for a fit of despondency, very unusual with him,—*"My dear fellow, I'm ruined—my jury eye is out of order."* He could say bitter things too, pleasantly enough; but the honey did not always extract the sting. Allusion has been already reluctantly made to Norbury's taste for a capital conviction. Chafed during a trial he took his revenge by thus alluding to it:—"The incident reminds me, my lord, of a judge I have heard of, who was never known to weep but once, and that was in a theatre." "Deep tragedy, I suppose, Mr. Grady." "Far from it, my lord, it was at the Beggar's Opera, when—*Macheath was reprieved*." This fitted but too well, was voted fact by acclamation, and became of Norbury's life the least apocryphal tradition. Every body said it was so natural that it must be true. Both these men were very able *Nisi Prius* advocates. Goold became a Master in Chancery, and died about a year ago. Grady held the lucrative office of counsel to the Commissioners of Customs, and in a green old age still enjoys, unenvied, a well-deserved pros-

perity. Long may he do so.¹ So much for the Common Pleas, *temporè*, Norbury.

But we have strayed so long there, we have scarcely time for a stroll through the Four Courts. Yet it is worth the trouble. The hall of that building is a spacious circle, surmounted by a very beautiful dome, beneath which were then daily collected all the Bar bustlers, and all the idlers of Dublin. Let us suppose ourselves there in the year 1806, (alas, forty years ago!) and commence our introductions. And stop. Mark well that slight, short figure, with restless gait and speaking gesture—he with the uplifted face, obtruded under lip, and eyes like living diamonds. See how the young men cluster round him. Observe the spell-bound gaze—hark to the ringing laughter. That is Curran—the unique, the wonderful, the inimitable, Curran,—who spoke as poets in their inspiration wrote, and squandered wit with Rabelais' profusion. Curran, whose words, merry or mournful, as his country's music, commanded tears or laughter at his bidding. Curran—in evil days erect amidst the groveling, pure amidst the tainted—in public life the most consistent of patriots—in private, the most social, exquisite, enchanting of companions.

Pass we away from him. Times never to return or be forgotten. Hours to which his genius gave the wings of angels, as bright and swift, and, sad to say, as transient in their flight, rise up before me, and forbid aught else to mingle with their memory.² And lo, singularly enough,

¹ We regret to state that Mr. Grady died when this contribution was in the press.

² To those who did not know Curran, this will seem exaggeration; but it will seem so only to those. Lord Byron, who knew him when he was ten years older, and past his prime, has left the following record, in his Diary and Letters, of the impression made upon himself:—

“I have met Curran at Holland House. He beats every body—his imagination is beyond human, and his humour (it is difficult to define what is wit) perfect. He has fifty faces, and twice as many voices, when he mimics—I never met his equal.”

“Letter to Moore, 1813.

“Curran—Curran's the man who struck me most. Such imagination! there never was any thing like it. He was wonderful even to me, who had seen many remarkable men of the time.”

Again:—“The riches of his Irish imagination were exhaustless. *I have*

here comes MacNally — Leonard MacNally — Curran's junior in most of the state trials consequent upon the dreadful " '98." We have lived to hear the question, —

" Who fears to speak of '98 ! " —"

I do for one. I fear even to think of it. Accursed year of blood and terror — of torture and conflagration — of widows and of orphans ! May the annals of mankind never be stained by such another ! When the pitch-cap and the triangle had done their work, and the drum-head courts' martial allowed the law to speak, MacNally became prominent on the scene. His very appearance fixed attention. Not naturally deformed, he yet seemed so. He had the misfortune, it is said, to have all his bones broken at one time or another. He parted company with both his thumbs, and either would not, or could not, tell how ; the latter most probably, as he always accounted for it, but never was there a tune richer *in variations*. He had one leg longer than the other, and one arm shorter, and limped like a witch. His eyes and voice pierced you like arrows, and served him well in cross-examination. Had MacNally devoted himself to literature, he would probably have been distinguished. His opera of Robin Hood, once very popular, still keeps the stage. It was a common practice with the juniors to play on his vanity respecting this production and the vast sums it brought him. The wicked process was this. They first got him to fix the aggregate amount, and then, luring him into details, he invariably, by third-nights and copy-rights, quintupled the original. This was a good pendant to the way he lost the thumbs. But the fault lay in the strength of his imagination being greater than that of his memory. He was more fortunate in his dramatic than in his legal lucubrations. As his chief practice at the Bar, at one time considerable, lay in the criminal Courts, he thought himself called on to produce a law book, which resulted in the publication of his "Justice of the Peace." This was meant to be a practical

heard that man speak more poetry than I have ever seen written, though I saw him seldom and but occasionally." (Diary.) This is true description, and would have strengthened by acquaintance.

work for the special guidance of the country gentlemen. Eminently practical it soon proved to be. Before six months elapsed most magistrates in Ireland were personally familiar with the perfections of a writ. It was a high treat to hear the author's cross-examination of one of the victim students. "In the name of Heaven, my good man, what could have prompted you to act in such a manner?" "Prompted me! Mr. MacNally — Mr. MacNally, I'm more than astonished at you. I acted on the authority of your own book." "Oh, my dear Sir, I am humbly conscious of its too numerous defects; but I pledge myself to you to correct them all, when — *it comes to a second edition.*" MacNally's originality and supposed patriotism rendered him an especial favourite with Curran. His was the last hand he shook in Ireland previous to the visit to this country, which terminated in his death. Associated intimately in the treason trials, neither of them were supposed particularly adverse to the cause which they defended. Having mutually agreed not to enrol themselves in the "lawyers' corps" organised at that period, Curran was much surprised one morning at his friend's announcement that he meant to become a member! "Have you considered the risk you run, my dear Mac?" said Curran. "What do I care for risks? Who doubts my courage?" "No one who knows you; — but the risk you run is from mutiny, — from disobedience of orders. You'll be shot. When the adjutant cries 'march,' you'll unquestionably *halt.*"

Amongst the memorable men they defended was the Reverend Mr. Jackson, once well known in England. He had been secretary to the celebrated duchess of Kingston, and was understood to have composed all the letters in her envenomed controversy with Foote. Becoming unhappily imbued with the sedition of the day, he was betrayed by an associate, dogged to Ireland by the directions of Mr. Pitt, and, when the plot was ripe, convicted of high treason. In order to avoid judgment and attainder, he took poison, and died in the dock unsentenced. As MacNally bent over the dying man, he faintly whispered: "*We have deceived the senate.*"

It sickens the heart even to think on the tragedies enacted

in these times. The miserable man who sold Jackson's blood received 100*l.* a year, as the purchase money, from his employer. Alas, what times they were! Society became chaos. No man dare trust his bosom friend — if he did, the scaffold repaid his confidence. Wretches actually sat at the table of their host, and dandled his children on their knee, while they were making or collecting evidence for his conviction. What a scene was disclosed on the trial of the Sheares! The very air seemed murky with prejudice. It was in such scenes, while vainly pleading for the lives of others, that Curran achieved his own immortality. We have heard him say he never felt safe amid his military audience, and often addressed a jury with bayonets at his breast. It was on one of these occasions that he thundered forth, while every eye gleamed on him with fury, — "Proceed to your office. Assassinate me you may — intimidate me you cannot." In Westminster Hall how strangely must it sound to hear of a law Court peopled by military, and a Bar with their robes worn over their regimentals! Yet in 1798—99, such was the spectacle which Dublin often witnessed.

Prominent in the crowd, and not a mere spectator, stood Peter Burrowes, the friend of Tone, of Emmet the elder, and of Plunket. With a profound intellect he was simplicity itself. He walked the earth neither seeing or hearing any thing around him. As he rolled his portly figure through the streets, his hands in his breeches' pockets, and his eyes glaring on his oldest friend as if he had never seen him, it was plain to all men that Peter was in the moon. This absence was invincible, and sometimes produced the most ludicrous effects. One day, being counsel for a defendant in a case of *Crim. Con.*, and intending to cast ridicule or something worse on his opponent, he thus broke forth with his most unmusical voice and gasping enunciation. — "But, gentlemen, did you observe the glowing description my young friend gave of the lady? With what gusto he dwelt upon each charm? May Heaven forgive me, but strange thoughts forced themselves uppermost! The couplet of the poet flashed on me as he proceeded —

'He best can paint a star,
Who first has dipped his pencil in' —"

He came to a dead stop — a roar from the Bar broke upon the silence, when Peter, looking as if just awake, brayed out to his junior, "In the name of Providence, what are they all laughing at?" The odd stop — the vacant stare — the earnest interrogatory — produced an effect which sets description at defiance. Peter repaid the friendship of Lord Plunket with a return bordering on idolatry. In the memorable contest between his friend and Mr. Croker for the representation of the university, the state of the poll might have been gathered from his aspect,— bright or black as the votes alternated. At last victory declared itself, and out he rushed into the court-yard as thoroughly intoxicated with joy as ever was Irish gentleman with whisky! In aught which affected the interests of his friend, his faculties embarked themselves till they became perfectly bewildered. Some still living, perhaps, may remember his motion for a criminal information against a printer, in the matter of Robert Emmet. It was a subject which deeply affected the feelings of Mr. Plunket, and no wonder. Emmet was represented in his dying speech to have reproached him as the teacher of the principles for which he was about to suffer,— as having been the constant guest at his father's table, and of having, after being warmed in his bosom, stung his son to death; a dreadful accusation, but utterly unfounded. The assertions were not true, and Emmet never gave them utterance. He was far too noble minded. The whole was an interpolation of some personal enemy. There is nothing, however, which has such vitality as slander. Dissect it as you may, like a dissevered serpent its venom will still quiver with a simulated animation. Plunket had, in two several affidavits, vainly supposed he had established his vindication. He was now compelled to make a third, and Burrowes moved on it. Every body knows the prosecutor's three names, William Conyngham Plunket. Peter was big with the importance of his motion. His heart began to palpitate — the throb by degrees mounted to the head, till heart and head together danced the hays through the three luckless names. It was, now "Mr. Conyngham" — now, "Mr. Wm. Conyngham" — now, "Mr. William Plunket Conyngham," — but, by no

chance did he ever stumble on the right one! His grandest exploit, however, in this line, took place at one of the assize towns on his circuit. A murder, which caused much excitement, had been committed, and he had to state the case for the prosecution. In one hand, having a heavy cold, he held a box of lozenges, and in the other the small pistol ball by which the man met his death. Ever and anon, between the pauses in his address, he kept supplying himself with a lozenge — until, at last, in the very middle of a sentence his breast heaving and his eyes starting, a perfect picture of horror, Peter bellowed out — “oh — h — h, gentlemen — by the heaven above us — I’ve swallowed the bull—llet.” We have endeavoured by the orthography to convey the pronunciation — as to the manner, it is totally out of the question, to attempt it. It is gratifying to record that, through Lord Plunket’s friendship, the last days of Burrowes were those of ease and contentment. About two years ago he died in London, at the age of ninety, in the enjoyment of 1600*l.* a year, the retiring allowance of an insolvent commissioner. He and John Parsons, uncle to Lord Rosse, were the first commissioners appointed in Ireland, and the appointments were understood to have come just in time. Kites — in this matter of fact country, prosaically called accommodation bills — had long flown between them; so long indeed, that the flight grew somewhat feeble. Parsons was himself an original and a wit. A tall, lanky man, he gave effect to his waggeries by a peculiar lisp. The retrieved associates on their way to Court for the first time, indulged naturally in mutual gratulations. “What a lucky hit, (said Peter,) who could have expected it?” “Every body, Peter. What else had we before us, but the *benefit of the act*?” There was a grave, literal meaning about Parsons’s notabilia which at once affiliated them. One instance occurs to us in his answer to a crown solicitor on circuit. This man had an awful halt in his gait, and limped hastily up to Parsons in the streets of Trim, with — “Pray, Mr. Parsons, did you happen to see Mr. MacNally walking this way?” “Upon my word, sir, (was the answer), I never saw him walking *any other way.*”

But — a truce to this gossip. It is time to pause. Reminiscences there are many still remaining, but pleasant as they are, they are mournful also. The generation of which we speak, and which, in our own time, lived and moved, and had its being, has gone before us, and their words, as we recall them, seem echoes from the grave. Fare thee well, then, old associates! In this record of the past, where, such is human nature, weakness will of necessity intrude on wisdom, I call your shades to witness, no ill-nature mingles. The time I passed with thee was the morning of my life, and fain would I preserve its recollections, even as I remember itself, pure and bright and cloudless.

It is time, perhaps, the curtain should descend. Yet can it be without one parting glance at thee, quaint Allen, and at thee, albeit nondescript and indescribable, old Jerry Keller! Allen was a person *sui generis*; a phenomenon, a lawyer "without guile;" simple, learned, abstracted; though in the world, he was not of it. Foiled in several attempts to obtain a fellowship in Dublin University, there can be no doubt he was somewhat crazed by the continued application. For an examination, comprising all the sciences and all the classics, the preparation is, necessarily, painful and laborious. It was said that Allen had undergone four disappointments, and more was the pity, for he was, as the Irish panegyric goes, "honest to a fault." Thus soured in the outset of life, he contracted peculiarities with which it was somewhat dangerous to tamper. An insolent attorney once woefully rued the experiment in the hall of the Four Courts, Allen dashing his bar wig in his face and nearly blinding him with the powder. They met, as a matter of course. The attorney fired and missed; Allen, brandishing his pistol wildly over his head, vociferated to his awe-struck second, — "Shall I rush on him with a shout, *after the manner of the ancients*?" Many, still surviving, recollect the memorable "appeal of murder," Allen being for the appellant, MacNally for the respondent, and Downes presiding. What a scene it was! The solemn, snuffing, ponderous chief, almost justified Curran's soubriquet of the "Quagmire," so awfully did he shake. Perplexed and somewhat terrified, he addressed him-

self to Allen — "Have you any precedent, Sir, — any authority to cite to us for this most extraordinary proposition?" "I have, my Lord," (replied Allen, whose enunciation was slow, measured and pompous,) "the authority of the most ancient Court on record, — the august Areopagus of Athens!" "And I," (squeaked MacNally,) "meet it with an authority *more ancient still* — our own immortal Shakspeare! Do you remember, my Lord, the coaxing invitation to poor Barnardine, — 'Come out, Barnardine, — come out and *be hanged?*' 'Not I,' quoth Barnardine, '*it's not convenient!*'" Allen, however, despite the Areopagus, produced many and apposite authorities, and drew deeply from the most recondite sources. But long and sorely did this chafe MacNally, upon whom the barbarous Latin and the Norman-French might have been palmed for Hebrew. Much did he endure, but he could hold out no longer — "In the name of heaven, I ask it, is a living man to be sacrificed to the dead languages? If my client is to die, I demand for him, my Lord, the benefit of *the vernacular!*" The arguments proceeded. The advocates waxed warmer, and Downes shook proportionably at the prospect before him. Only just to think, on his being fated to figure in his grey old age as a judicial bottle-holder! He, the very model of ermined proprieties! So officially formal and so personally pure, that he should have lived under Elizabeth — a virgin judge! "Can it be possible," (he piteously exclaimed,) "that this 'wager of battle' is seriously insisted on? Am I to understand this monstrous proposition as being propounded by the bar, that we, the judges of the King's Bench, the recognised conservators of the public peace, are to become, not merely the spectators, but the abettors of a mortal combat! Is this what you require of us?" "Beyond all doubt," said Allen, "and from the ancient books, the manner of it is to be *THUS*. Your Lordship is to be elevated on a lofty bench, with the open air above you, the public before you, and a platform beneath you, on which the combatants are to fight until the life of one of them's taken." "Ay," (again shrilly squeaked MacNally,) "from the day-light to the dusk, till your Lordship calls out to us, 'I see a star.' This is the consequence of Mr. Allen's proceedings." As

good luck, however, would have it, at this critical moment the case of Abraham Thornton turned up in England,—quite as much to the horror of Lord Ellenborough as to the relief of Downes.

The appeal failing in England, the Irish proceeding shared its fate, and the Legislature has since rendered the recurrence of this barbarous process impossible. Perhaps here it may be only right to add, in reference to the Irish Chief Justice, some of whose peculiarities we have noted, that he was patient, impartial, and, for the times, learned.

Of Keller, Jeremiah Keller, familiarly called Jerry, it is difficult to speak, speaking justly, mirth and melancholy so blend with the recollection. Possessing talents of the very highest order, he dwindled into a cypher. Capable of every thing, he achieved nothing. An independent spirit more than counteracted his superior powers. He was ignorant of the arts by means of which blockheads distanced him. Simpleton enough to rely on merit in a venal age, when all around him was corruption,—when the Bench was purchased by the sale of the country, and it was said of some that they never had been advocates until they became judges,—no wonder Keller rose not! He failed in the very elements of success. He sought no character for himself by whispering away another's. He had not studied even the alphabet of huggery. He was neither obsequious to an attorney's wife, nor amorous of an attorney's daughter, nor even ambitious of being an attorney's host! When most men around him founded all their hopes upon the *prandial investment*, Keller gave no dinners, and, of course, got no clients. The degrading custom was so notorious in those days (now, of course, become obsolete), that Grady alludes to the failure of the speculation in his own case, actually as a reason for relinquishing the profession. He plaintively exclaims, in his poem called "The Nosegay,"

"I lost in mutton what I gain'd by briefs ;"

never calculating that an attorney's "appetite grew by what it fed on." Keller at last, worn out with hope deferred, in an evil hour sought refuge in society. That wounded spirit, which might have led juries captive, or enchained a senate, appeased itself by "setting the table in a roar." The bottle, if it must be

told, became a substitute for the brief; and all that remains of talents sadly sacrificed, are the random sallies which sprang from its inspiration. Bitterly conscious must he have been of this, when seeing Mayne, the solemn Mayne, who never learned a laugh, taking his seat upon the Bench, he was overheard muttering to himself—"What is Newton worth, when there's Mayne risen by his gravity, and here's Keller sunk by his levity?" Keller's person was portly, his aspect solemn, and his whimsicalities so peculiar that they might be recognised at once. As Curran said, "There was no mistaking them, — *the name was on the blade.*"

There was, on the Munster circuit which he went, a Roman Catholic barrister of the name of O'Gorman, a most excellent man, whom Lord Anglesea did himself credit by promoting. This gentleman naturally took part in the emancipation struggle, but, as Keller chose to fancy, too prominently. Observing him one day at the Bar mess, rather mistaking his dish, he called out, — "What, O'Gorman, you of all men, eating meat on a Friday!" "Do you think, Jerry," said O'Gorman, "that I have the Pope in my belly?" "No, but a great deal of the Pretender in your head." It may easily be supposed, from what has been already stated, that Jerry's law was not weightier than he could carry. He was by no means pleased at any allusion to this subject, nor very particular in revenging himself if it was made. There was a luckless attorney, in the city of Cork, who had a malformation of the hands. During a session he and Keller differed in the construction of an Act of Parliament. Both grew warm and pertinacious. At length the attorney sent for the statute, and, spreading his spider fingers over a section, exclaimed in triumph, — "I knew I was right — the barrister's beaten — here's the clause for you." "You are right for once," said Jerry, "I always thought them more like claws than hands." Notwithstanding an occasional moroseness, Keller was very much beloved by the profession. The successful had no cause for envy, and others, whom his sarcasms wounded, found an apology in his disappointments. There were times, however, when forbearance itself was in danger of being exhausted, after dinner especially. Mr. Nicholas Philpott Leader fell one evening under his extreme

displeasure, and was belaboured accordingly. Leader's hair, it must be premised, was somewhat frizzled, and his principles quite liberal enough. The difference arose from that fertile source of all differences in Ireland—a political discussion, and Keller, foiled in the argument, launched out into the most outrageous personalities. The outside of poor Leader's head, and its interior conformation, divided between them sarcasms the most offensive. Leader felt called upon to notice it, and a man of war, at daylight, wakened Jerry out of his sleep. Loudly and gruffly did he grumble at the intrusion, as he poked his red woollen night-cap over the counterpane. "In the very grey of the morning, too," said Keller, "and this you call good breeding." "I tell you what, Mr. Keller, I'll have none of your waggery,—I'm not here to be trifled with; Mr. Leader's wrongs must be atoned for within the hour, look at your dressing-table and you will see that I'm in earnest." Jerry looked up, and a pair of Wogdens met his bewildered vision. "I hope, sir," said he, "you mean to offer me no violence in my bed." "You must not fear that, Mr. Keller, I pledge my honour to that." "Very well, then," said Keller, "*I'll not get up to-day; so now be off at once to your principal, and tell the woolly-headed republican I forgive him.*" A day thus passed over the wrath of Leader, whose characteristic good nature soon yielded to the general decree,—that after dinner Jerry was to be privileged. Peace be to thy frailties—much beloved old Jerry—heirs enough to them are left behind thee; but to thy atoning qualities, a populace of sneerers can furnish no successor!

ART. II.—LAW OF DISCOVERY.—SELF-CRIMINATION.

A QUESTION of great importance and some nicety touching the law of evidence was lately discussed before the twelve Judges. It was, whether statements forced from a person by cross-examination in a Court of justice against his will, and

by the pressure of the presiding Judge, could by law be given in evidence to convict him upon a trial for a criminal offence. On the one hand it was argued, that no man was bound to criminate himself, and that if any compulsion were used to make him do so, the law of England would protect him from having what he had said under such pressure, used against him. On the other it was insisted, that, although perhaps the Judge might have been wrong in forcing the examinant to answer, still the answer once given was evidence. The discussion arose out of these circumstances. An action was brought against one Booth on an acceptance, purporting to be his. The defence was forgery, and evidence was given on both sides, some witnesses swearing, that the acceptance was in Booth's handwriting, and some that it was not. At last one G. who was the drawer of the bill, was called for the defence; and he swore, that the handwriting was not Booth's. Being cross-examined for the plaintiff, after stating that he had himself bought the blank stamp, and had drawn the bill, that the stamp had never been out of his possession till it was filled up, and that he had no authority to put Booth's name upon it, the examination proceeded thus:—*Q.* Did you know what you came here to prove? *A.* I did not, till I came into the box. — *Q.* Do you know what you are attempting to prove? *A.* I do. — *Q.* What! do you mean to say the acceptance is a forgery? *A.* I mean to say it is not in Booth's handwriting. — *Q.* Not in Booth's handwriting! Who accepted it? *A.* I am in the hands of the Court. Lord Denman. — It must be answered. The cross-examination then proceeded at great length, it becoming more evident upon every answer, that G. had either forged the acceptance, or had uttered it knowing it to have been forged by some person under his influence. The witness frequently objected to answer further, and the Judge as often compelled him. After a long cross-examination the Judge summed up, the jury gave their verdict for the defendant, thus finding the acceptance a forgery, and the Judge committed G. to prison, and bound a reporter over to prosecute him for forging or uttering a forged acceptance. He was tried at the Central Criminal Court, and convicted; his answers on the previous trial being used against him. But it having been

insisted, that his answers ought not to have been used against him, the point was reserved for consideration by the Judges, and it is still *sub judice*. Meanwhile we think, that it may be useful, if, without interfering with the point immediately before the Judges, we offer to our readers some observations upon the existing state of the law as to discovery and self-crimination, and offer some suggestions as to what true policy requires that the law should be.

Of course, nothing can be more clear than that it is an established principle in the law of England, that no man is bound to criminate himself, or to answer any question, the answer to which may tend to subject him to punishment, penalties, or forfeiture. No doubt he must answer any question put by competent authority, the answer to which may tend to show that he is liable to some pecuniary or other demand of a *civil* nature, not being in the nature of penalty or forfeiture, but further than that, generally speaking, he is not bound to go. And not only is he privileged against answering the plain question, "Did you commit such a crime?" or, "Have you incurred such a penalty?" but he is privileged against answering any question, the answer to which, either in the negative or the affirmative would furnish, as Lord Eldon frequently expressed it, *even a link* in a chain of evidence to convict him. How far this is wise, we will not, at present, stop to inquire. Our ingenious neighbours on the other side the water think differently from us. They allow of judicial examinations of a suspected criminal with the view of extracting evidence from him of his guilt. But the results of their practice do not invite us to follow them. The other day one of the great officers of the Crown in conducting an examination of the Duc de Praslin, assumed his guilt, as a matter too evident for dispute, and on that very ground urged him to confess. Now to us it seems, that if the Duke's guilt were so very evident, justice might have been reached without resorting to such pressure upon the supposed criminal's conscience, and that, if it were not, the method of proceeding was most insidious and unjust, and if so, was unbecoming an officer, who on that occasion was acting as the representative of the very fountain of justice, — the Crown. No doubt the

power of interrogating an accused person would be a most powerful aid in bringing the guilty to justice; and if the interrogation were conducted on perfectly fair principles, and the party examined had all proper assistance to enable him to meet the case attempted to be raised against him, the good might be secured and all evil avoided; but it must never be forgotten, that an inquiry of this kind is conducted by power against weakness — by society against an individual, — by a person skilled in the art of examining, and perfectly collected at the time, against a person unskilled and frequently confused by terror, — by a person at large against a person in custody, — and in short, that every advantage is on the side of the interrogator, and every disadvantage on the side of the examinant, and, as at present advised, we are disposed to adhere to our cold and dignified abstinence from means, which we could use most effectually, if we would, and submit to the evil of permitting the guilty occasionally to escape, rather than fall into the very undignified courses of our neighbours.

Be this, however, as it may, it is certain, that by the Law of England no man is bound to answer any question the answer to which, one way, would tend to criminate him, or expose him to pecuniary penalties or forfeiture. We use the expression “one way,” because if the answer either way, whether in the negative or affirmative, would so tend, he is clearly privileged from answering. In the *East India Company v. Campbell*¹ it was argued, that the defendant ought to be compelled to answer, because “none of the questions would harm him if he answered in the negative, as he might;” but the Court said, “the rule is, that the Court shall not oblige one to discover that which, if he answers in the affirmative, will subject him to the punishment of a crime; for it is not material, that if he answers in the negative it will be no harm.” We use the expression, would “*tend to*” criminate him, because an examinant has a right to refuse to answer any question, the answer to which would form even a link in a chain of evidence to convict him.

In *Cates v. Hardacre*², an action was brought on a bill

¹ 1 V. S. 227.

² 3 Taunt. 424.

of exchange. The defence was usury, and a witness being called to prove the defence, the bill was put into his hands, and he was asked, *whether he had ever before had it in his possession?* Before he had answered, the plaintiff's counsel asked him, whether he had not been indicted for usury? and on his saying he had, the counsel cautioned him against answering questions, the answers to which might tend to criminate him. The witness then said, that he thought his answer to the question proposed would have a tendency to convict him of usury, on which the presiding Judge told him that, if *he thought* so, he was not bound to answer the question. The witness declined to answer, and the consequence was, that the plaintiff got a verdict. On motion for a new trial, it was urged that the ruling was wrong, for that it was not sufficient that a witness *thought* that his answers would tend to criminate him, but that it ought clearly to appear that they would have that effect. But Mansfield, C. J., said, "Your questions go to connect witness with the bill, and they may be *links in a chain*." In *Claridge v. Hoare*¹, Lord Eldon said, "The defendant is not bound to answer to any fact the answer to which may furnish a *step* in the prosecution, if any body should choose to indict him; and in *Parkhurst v. Lowten*² he said, "A witness is not bound to answer any one question among many which, *as a link*, has a tendency to subject him to a penalty."

It is true that in *Dixon v. Vale*³, C. J. Best said, that if a witness being cautioned that he is not compellable to answer a question that may criminate him, chooses to answer it, he is bound to answer all questions relative to that transaction, and cannot be allowed to object, that any further question has a tendency to criminate him." And in *East v. Chapman*⁴, C. J. Abbott, upon being appealed to by a witness, who on his examination in chief had stated much that was material for the defendant, but objected on cross-examination to answer whether the manuscript of an alleged libel was not in his handwriting, said, "I think, having given evidence, you must answer. You might have objected at first, but

¹ 14 V. 65.² Sw. 202.³ 1 Carr. & Payne, 279.⁴ 2 Carr. & P. 573.

now you must go on, otherwise the jury will only know half the matter." But in *Ex. p. Cossens re Worrall*¹, Lord Eldon is represented to have said, "I apprehend² that, if a man has gone on answering questions that had a tendency to criminate him, he may stay in answering those questions whenever he pleases. You cannot carry him further than he chooses voluntarily to go himself."

But, when we have got thus far in ascertaining the rights of the examinant, still a great practical difficulty remains. Who is to be the judge, whether the answer will or will not tend to peril the examinant? How much is to be told by him before the obligation to tell more ceases? It has been sometimes said, the Court must be the Judge, and the examinant must tell the Court enough to enable it to judge how far the excuse for not answering is a *bonâ fide* one. But this argument assumes that the examinant *must furnish links* in a chain of evidence to convict him, in order to *avoid furnishing links* in a chain of evidence to convict him, and it seems, therefore, self-contradictory. Others have said, all must be left to the witness's own conscience. He must swear, that he *believes*, that answering will endanger him, and if he does that, the Court must be satisfied. What! may he decline to hint even at the supposed crime, and merely say, "Answering will tend to convict me of a crime," without even defining the crime, and without giving any explanation as to how the answering will have such tendency? These are the two extremes. Each is objectionable. The one seems to put every thing in the power of the Court, the other every thing in that of the examinant. The one would enable the Court to go great lengths in compelling an examinant to help to convict himself; the other would enable an unwilling witness or examinant to go great lengths in suppressing truth and baffling justice, without exposing himself even to the risk of being punished for perjury. There are, indeed, some cases, which have narrowed this field of controversy, but they have not altogether cleared away the difficulties, the truth being, that the difficulty is so inherent in the subject, that it is inseparable from it. In

¹ Buck. 531.

² P. 545.

Vaillant v. Dodemead¹, Lord Hardwick said, "These objections to answering ought to be held to very strict rules;" and in every case it has been assumed, that so much of the ground for not answering, as is supplied by the examinant, must be fortified by his oath. In Moseley, 228. it is mentioned, that a demurrer by a witness to an interrogatory in Chancery was overruled for want of an affidavit; and in Parkhurst v. Lowten², Lord Eldon said, "At law, the witness swears to the facts which privilege him, and the Court then decides the question of privilege." And in the same case (p. 203.), he says, "It is clear that in some way, the Court ought to have the sanction of an oath for the facts on which the objection is founded." Of course the examinant objecting to answer, may for that purpose assume so much of his ground for not answering to be established, as is shown by the examining parties' allegations or pleadings, and he need only affirm on oath the remainder of his excuse. The pleadings of his antagonist will be deemed equivalent to his oath. In Claridge v. Hoare³, Lord Eldon said, "The bill and plea together" (a plea is of course on oath) "bring forward the case of an individual charged with felony, and an agreement between several other persons, of which the object was to prevent a prosecution."

Such being the law, two important questions arise, bearing on Law Reform:—First, does this law promote or impede the due administration of justice? And, secondly, can a better rule be suggested? To enable us to answer the first question, it will be well to examine the facts of a few of the cases that have arisen, and see how the law operated in those cases. We will select for this purpose *Brownsword v. Edwards*⁴; *Sharp v. Evans*⁵; *Claridge v. Hoare*⁶, and a case of *Westrop v. Benson*, heard before the Vice Chancellor in April, 1822, and of which we ourselves took a note. In *Brownsword v. Edwards*, the object of the suit was to recover an estate, and Edwards was interrogated, whether she had ever married one Brownsword, the plaintiff's father? She pleaded, that Brownsword had married her sister, and that, if she answered the question in the affirmative, she would furnish evidence

¹ 2 Atk. 524.² 2 Sw. 197.³ 14 V. 59.⁴ 2 V. S. 243.⁵ 3 Peere, W. 375.⁶ 14 V. 59.

against herself in a proceeding in the Ecclesiastical Court for incest. Her plea was allowed, and she was excused answering. In *Sharp v. Evans*, the object of the bill was also to recover an estate and its title-deeds, and the plaintiff alleged that one Carter, a co-defendant, had bought the estate, and procured the title-deeds of the defendant, Evans, after notice of the plaintiff's title, and after the plaintiff had obtained a verdict in ejectment against Evans; and he interrogated accordingly. Carter pleaded the statute 32 H. 8. c. 9. s. 2. against buying and selling controverted rights to land, unless the seller, or those under whom he claimed, had been in possession one whole year previous to the sale; and he then averred, that Evans had not been so in possession, and pleaded the whole matter as an excuse for not answering. The plea was allowed. In *Claridge v. Hoare*, a father having heard that his son, who was a banker's clerk, had embezzled his employers' property, went in great agitation to the bankers, and was there induced to transfer a large sum of stock to a trustee for the bankers, to cover their losses. He had no solicitor to advise him, and the whole arrangement was made in a very hurried manner. He was afterwards advised that the transaction was illegal, and that he was entitled to have his stock back; and he filed a bill for the purpose against the bankers, stating the facts, and interrogating accordingly. The defendants pleaded, that the facts inquired of related to the embezzlement, and that, if they answered, their answers might "subject them to penalties" for compounding a felony. Their plea was allowed. In *Westrop v. Benson*, the plaintiff had filed his bill to recover some money he had paid to the defendant, and having stated the facts, interrogated accordingly. The defendant pleaded the 49 G. 3. c. 186. against selling offices, by which penalties were imposed, and then averred that, the payments referred to related to transactions prohibited by the act; and that he was advised and believed, that the discovery sought might subject him to the penalties imposed by the act.

Now, what was the effect of the rule of law in each of the above cases? was it not to impede the administration of justice? was it not to defeat right and help wrong? and in each case for the benefit of a wrong-doer? In *Brownsword*

v. Edwards, Brownsword was deprived of evidence, he was entitled to, for the benefit of a person who by the hypothesis had been guilty of incest. In *Sharp v. Evans*, Sharp was deprived of evidence for the benefit of a person who had been guilty of a breach of the statute law. In *Westrop v. Benson* the same; and in *Claridge v. Hoare*, an agitated father, over whom an unfair advantage had been taken, was deprived of evidence for the benefit of a person who had, by the hypothesis, compounded a felony. Did not the law, in each of these cases, impede the administration of justice? and were not its results much to be lamented? The civil rights of innocent plaintiffs were denied, that guilty defendants might be sheltered from the consequences of their guilt. This would be to be regretted, if the peril of prosecution had been real; but it should be remembered, that in each of the above cases, the probability was that no prosecution would ever be instituted. Who ever heard of a sister who had married a deceased sister's husband being prosecuted for incest in the Ecclesiastical or any other Court? Who ever heard of a person being prosecuted under the statute of Henry VIII. for buying controverted rights to land? Who ever heard of a banker being punished as a criminal for getting back money, that he had lost, although in doing so he had given people to understand that he would wink at a felony? The fear of prosecution is in all such cases mere pretence. The examinant, who pretends to be trembling, is in fact laughing; — laughing in his sleeve, laughing at his antagonist, and laughing at the law. He is thanking his stars that he can turn the vain threatenings of the criminal law into a real and effectual instrument of defence against the only thing he really fears, a civil demand. Fortunately, for the interests of creditors, Lord Eldon declined to countenance this absurdity, when attempts were made to import it into the Bankrupt Law.

“I conceive,” said he, “that there is no doubt that it is one of the most sacred principles in the law of this country, that no man can be called on to criminate himself, if he choose to object to it; but I have always understood that proposition to admit of a qualification with respect to the jurisdiction in bankruptcy, because a bankrupt cannot refuse to discover his estate and effects,

and the particulars relating to them, though, in the course of giving information to his creditors or assignees of what his property consists, that information may tend to show he has property which he has not got according to law; as in the case of smuggling, and the case of a clergyman carrying on a farm, which he could not do, according to the Act of Parliament, except under the limitation of the late act; and the case of persons having the possession of gunpowder in unlicensed places, whereby they became liable to great penalties, whether the Crown takes advantage of the forfeiture or not; in all these cases the parties are bound to tell their assignees, by the examination of the commissioners, what their property is, and where it is, in order that it may be laid hold of for the purposes of the creditors.”¹

If the rule had been imported into the Bankrupt Law, it would have made the whole of that law a dead letter against a fraudulent bankrupt, for the bankrupt would have been enabled to say, “You allege that I have concealed my property; if so, I have committed a crime; therefore you must not ask me any question tending to show that I have concealed it, for if you do, you will make me criminate myself.”

The law, then, as it stands, thwarting the true objects of justice, the next question is, whether a rule might not be suggested, which, in the great majority of cases, would leave the ordinary course of justice unimpeded, and would yet leave the law to take its course against criminals in cases where a real object was to be attained; and we would suggest, as a means of attaining both objects, an enactment that, if an examinant, whether a defendant or witness, be required to answer a question, and he objects to do so, on the ground that his answer might form a link in a chain of evidence to subject him to punishment, penalty, or forfeiture, it shall be left to the judge’s discretion whether he will enforce an answer or not, having regard to the general interests of justice; and that, if he does enforce an answer, his having done so shall have the same effect as a pardon would have had, or a waiver or release of the penalty or forfeiture; in other words, the *compelled* answer of the examinant should practically protect him from that punishment, penalty, or forfeiture, of the fear of which he, in most cases fraudulently, avails himself to close his mouth, and suppress truth.

¹ Ep. Cossens re Worrall, *ubi supra*.

The effect of such a rule in *Brownsword v. Edwards* would have been, that the lady who suggested that she had committed incest, would not have been enabled to avail herself of her incest to retain her antagonist's property; its effect in Carter's case would have been, that he would not have been enabled to avail himself of his breach of the statute of Hen. VIII. to baffle his antagonist; and so of the rest. But it may be said, it would be mischievous to give this prerogative of pardon to Judges. To this we would answer, if Judges cannot be trusted, who can? But we have another, and perhaps a better answer — that the pardon in nineteen cases out of twenty would only produce the very same effect, that the indifference of prosecutors, and the trouble of bringing criminals to justice already produces in innumerable cases, *impunity*. Does any body imagine that Mrs. Edwards was brought to justice for incest; Carter, for buying controverted titles to land; Hoare, for having compounded a felony; or Benson for having sold an office? There is certainly no evidence that they were punished, and as certainly some evidence that they were *rewarded* for their crime, for it helped them to defeat an antagonist seeking a civil remedy for a civil wrong.

Let us imagine such a rule to have been in existence when G. was examined. On G. declining to answer, the Judge would have had to consider whether it would be best to compel an answer at the expense of pardoning G. his forgery, or not. He might have thought that G.'s offence, unlike that of Mr. Carter, the buyer of a controverted title, was too great to be pardoned, however desirable it might be to have *full* evidence in the civil question between the holder and acceptor of the bill, and he might have said, I will not compel an answer, and might have left the case to the jury in an incomplete state. If he had pursued this course he might still have committed G. for trial, as he actually did, and might have bound the reporter over to prosecute: and if the jury had found a verdict for the plaintiff, the Court might have suspended the execution of the judgment, on terms, till G. had been tried, and thus the justice of the case might have been fully met. By such means the rare case of a crime, the actual punishment of which is important to the public,

might be provided for ; and in the ninety-nine other cases, in which the punishment of the offence is unimportant not the slightest practical mischief could arise from the Judge obtaining the evidence for the civil purpose at the expense of sacrificing the public right of demanding conviction and punishment, *if any one should choose in the public name to demand it.*

This would in our opinion be the best mode of obviating the mischief. The next best would be, to lay it down as a general rule, that no statement extracted by the pressure of a Court for a civil purpose should ever be admissible as evidence to subject an examinant to any punishment, penalty, or forfeiture.

It is a curious fact, that since writing the above we have chanced to alight on a statute framed on the very principle we advocate, for by the 52 G. 3. c. 62. s. 35. it is enacted, " That no person shall be liable to be convicted by any evidence whatever, as an offender against this Act, in respect of any act, matter, or thing done by him, if he shall at any time previously to his being indicted for such offence, have disclosed such act, matter, or thing on oath, under or in consequence of any compulsory process of any Court of Law or Equity in any action, suit, or proceeding, in, or to which he shall have been a party, and which shall have been *bonâ fide* instituted by the party aggrieved by the act, matter, or thing which shall have been committed by such offender aforesaid."

ART. III. — WRITERS ON THE CONFLICT OF LAWS, OR ON PRIVATE INTERNATIONAL LAW.

PART III.¹

In the two preceding parts of these observations we trust we have shown —

I. That there is nothing in the qualities of laws, designated by the terms personal, real, or mixed, which af-

¹ See Part I. 4 L. R., 318. Part II. 6 L. R., 56.

fords any satisfactory grounds for the solution of the questions involved in the *Conflictus Legum*, or for warranting the extension of the laws of one state, into or over the territory of another, or for determining, of which state the law is to preponderate and predominate over that of the other.

II. That, on the other hand, the independence and sovereignty of states do not entitle them to establish such laws, and issue such orders, within their own territories, with regard to foreigners, as they may think fit, in the event of their having intercourse with foreign nations for commercial, or other purposes; that mere *comitas* courtesy or convenience, dependent on the will or caprice of nations, cannot become the basis of any valid compulsory right; that, so far as not founded solely on consent, the basis of Private International Law must be sought in other more stable and onerous considerations, than courtesy or convenience, and can only be found in legal or judicial considerations, such as those on which the internal jurisprudence, or private law of states, rest.

While, however, we thus place the principles of private, as well as public International Law, as being co-ordinate with, or on the same level and footing with, the principles of the private common law in civil societies or states; — with the principles of the just and the unjust, which precede all human legislation, and which the legislative assemblies and judicial tribunals of nations, in the course of generations, merely so far observe and record, unfold, establish and enforce, we by no means undervalue the positive private International Law, which arises in the course of civilisation from the consent of nations, either express or implied and virtual, though tacit. When the consent is expressed in national treaties, the private International Law thereby created may be termed conventional. Such treaties are peculiarly adapted for the regulation of the intercourse of nations in commerce, during peace, and form an extensive and important part of positive private International Law between the contracting parties. But they do not extend beyond these parties, or beyond the time to which they may expressly or by implication be limited. They form no part of the common or general private International Law; and the multiplication of such treaties can never establish a rule

binding upon third parties, or generally upon nations; because each treaty, however often repeated or multiplied, is, *ex facie*, confessedly an exception from the general rule or practice, which could not be enforced except under the treaty, otherwise there would be no occasion for entering into it; and because there is in all bi-lateral contracts, as observed by Savigny, an element of free will, arbitrary choice, or option.¹

Positive Private International Law may also be constituted otherwise than by treaties or mutual conventions. It may be constituted by the uni-lateral act of a nation. Thus, if a government promulgates an internal law within its own territory, but affecting the interests of foreigners, which it is clearly entitled to do, yet, if foreigners, acting on the faith of that law, acquire rights, the nation is bound to fulfil the obligations which the rights so acquired may imply. In the same way, without any formal mutual treaty or convention, nations by long established usage, in the intercourse of their individual citizens or subjects, may become bound to each other. And in this way various internal regulations by states, affecting foreigners, may become part of positive Private International Law against such states in relation to other states, not resting merely on comitas or courtesy, but legally binding, and susceptible of enforcement upon the same principle, as an individual living in civil society, who is under no obligation to perform a particular act, may become bound to do so, either by express contract, agreeably to the rule, *pacta sunt servanda*, or the recognised maxim, that reasonable expectations, for which adequate grounds have been afforded or held out, cannot, *bonâ fide*, be, in justice, or legally, disappointed.

But besides this limited Private International Law, resting merely on consent, either expressed in particular treaties and special conventions, or in uni-lateral statutes, ordinances, and proclamations, or implied from long established reciprocal usage, we have seen there is also a General Private International Law, which is not merely a matter of comitas or courtesy, to be observed at pleasure, or not, if found inconvenient, not mere ethical rules, *præcepta virtutum*, but in reality a branch of what we call Law, susceptible of phy-

sical enforcement under and in virtue of the juridical relations, which arise in the intercourse and mutual dealings of the inhabitants of different countries and states. And upon this footing, we inquire, how the rules of that law, or the rights and obligations under it, may be enforced during peace, without nations resorting to war, or physical force in their corporate capacity? In the progress of civilisation, experience shows, each nation comes to have, among other internal institutions, a legislative and a judicial power and establishment. The former prescribes rules for the conduct of the individuals of whom the nation is composed, and establishes what is called the Statute Law of the nation. The latter recognises such rules of justice, as have grown up in the practice and inveterate usage of the people, and decides disputed claims, its decisions becoming precedents for the future; thereby developing what is called the Common Law of a country. Farther, the latter, the Judicial Establishment, enforces and gives effect, under certain sanctions, both to the Statute Law and the Common Law of the nation.

Such being the state and condition of the governments of civilised nations, it appears that, without nations going to war, the rules of Compulsory Justice, in the ordinary business transactions of life, which are enforced by the Courts of Law of one state, between or among its subjects, may also be enforced by these Courts, when the transactions take place between the subjects of that state and the subjects of other states. And the question comes to be, — how is this to be done?

When the laws of independent states are identical or very similar, no difficulty can exist; because in the foreign country we receive the same, or similar justice, as in our own courts, and foreigners in our courts receive the same or similar justice, as in their own. It is only when the laws of separate and independent states are different, that the *Conflictus Legum* can arise.

As the number of cases, in which the laws of different countries vary, appears from experience to be indefinite, and to pervade almost all the departments of the private internal law of a nation, it seems unavoidable, in the discussion of the

various questions of the *Conflictus Legum*, to run over in a cursory manner the whole range of that private internal law. Any thing like an exhaustive analysis, is perhaps not to be aimed at; but a sufficiently comprehensive view, it should seem, may be accomplished, by taking one of the most recent and best arrangements of the subjects of private law. And so far as they were not guided by, and did not rely upon the continental writers of the seventeenth or eighteenth centuries on the *Conflictus Legum*, as authorities, this is what Mr. Justice Story, Mr. Burge, and Dr. Fœlix, appear, to a great extent, to have done; the two latter in a more full manner.

Agreeably to his theory of there being no foundation for private international law, but the *Comitas Gentium*, the good will, or consent of nations, Dr. Fœlix finds it necessary to detail, and details briefly, but in a comprehensive manner, the particular internal laws of the different European nations, on points where a *Conflictus Legum* occurs. This is also what Dr. Schaeffner appears to have attempted to do, and to have so far succeeded in doing. And we cannot agree with Dr. Fœlix in opinion, that the theory of Dr. Schaeffner is arbitrary, and does not rest upon the relations of different nations to each other, except perhaps, in so far as the latter seems to give a predominance to the special dispositions of the country, in which the question arises. For, "in the absence of such special dispositions," Dr. Fœlix admits, p. 21 and 22., that Dr. Schaeffner holds, we must "appreciate each position or situation of man, each act of his civil life, according to the laws of the place where this position has been taken, or this act has had its birth;" whilst Dr. Fœlix himself maintains, that, except from *comitas* or courtesy, each nation is entitled to regulate, and very frequently does regulate, the decision of the questions involved in the *Conflictus Legum*, by its own special ordinances.

Upon more profound inquiry, we conceive, it will be found that neither the reality or personality, or mixed nature of laws, nor the mere *Comitas Gentium*, nor even the special legislation of each nation, actually regulate the decision of such questions; but the legal considerations and principles applicable to the facts and circumstances of each

case, — such legal principles and considerations as decide the questions between individuals in private law, or internal jurisprudence; — the considerations of facts and circumstances, and of legal principle, and juridical relation, by which we are accustomed to be guided, in unfolding the internal common consuetudinary law of a state.

We proceed, then, shortly to notice the different departments into which the private law of states, civil and criminal, has been divided. And, in the private civil law, after the individual person, capable of, or invested with rights, we shall agreeably to the order suggested by Professor Savigny, first consider real rights — the rights immediately connected with things, or external material objects, chiefly those more subservient to the subsistence, clothing, and lodgement of men on this earth, because the greater part of what have been called personal rights, require and pre-suppose a knowledge of real rights.

To begin with persons as capable of, or as invested with rights, viewing the human being as an insulated individual, detached from the other members of the species, and contemplating his position on this earth, and the events of his life, and death, as invested with certain rights in relation to his own person, we find, besides the power of exercising his corporeal and mental faculties, his birth, or origin among a certain tribe or nation, or in a particular country, as distinguishing him as a native, in contrast to a foreigner; his parentage, or his birth of married or unmarried persons, as determining his legitimacy or illegitimacy; his growth and age, as involving infancy, puberty, minority, majority, and old age; his place of permanent residence or domicile, as constituting him an inhabitant of a particular country; his locomotive power, and change of permanent residence, as affecting his nationality. These circumstances are obviously all attributes of the person of the individual, and may with great propriety be denominated personal rights. And it is almost intuitively perceived, that questions respecting these rights must, from the nature of things, be determined by the laws of his own country, and permanent residence acquired.

When the individual has had his birth and permanent

residence, where his parents were born and have resided, or where they have another subsequent permanent residence, or when the individual has acquired a new nationality, by a change of permanent residence, the idea of questions relative to such rights being determined by the law of a foreign country, or by any other law than the *Lex loci Originis et Domicilii*, would be absurd. If a foreign tribunal truly intend to administer justice in such cases, it must give effect to the law of that country, by which alone they can be decided. The calling the law, which recognises such rights, personal, as the continental jurists did, and the deduction, that, in such cases, the law follows the person, and that this personality of the law gives it a predominance over the law of the foreign country, where such questions are required to be decided and enforced, seem to be a needless circuitous mode of arriving at a very manifest conclusion.

Having thus noticed the *Conflictus Legum*, so far as it occurs in questions affecting the rights of the insulated individual regarding his own person, or corporeal and mental frame, we proceed to the Rights, with which that individual is born, or comes to be invested, over, or with reference to, external objects, separate and distinct from his own person. These external objects are either things, including unorganised and inert matter, the lower animals, and vegetable productions; or the particular actions of other individuals, designated by the Romans *obligationes*, *præstationes*; by Mr. Bentham, services; and by several of the late German jurists, obligations; there being no civil right to the persons, or to the entire control of all the actions of other men, — which would be slavery.

The rights to and over things are, the primary and most important one — the right of property, — the exclusive right of possessing, using, and disposing of things, directed against all and sundry persons, *adversus omnes*; and the subordinate real rights, composed of parts of the right of property, such as lease for a definite period, pledge, mortgage or security, lien or right of retention, rights of rural or urban servitude.

Of the various distinctions of things, the most important, in a juridical or legal point of view, is the division into things moveable and immoveable. With regard to things

immoveable, as we are here considering the intercourse and consequent juridical relations of individuals as members of different independent nations, the most important object, in point of legal right, dominion, and appropriation, is the territory of the nation, divided among its inhabitants into different portions, allotted to and forming the landed estates of these inhabitants. Indeed, the idea of territory, or a portion of this earth occupied for habitation, and cultivated for subsistence, is involved in the more complex notion of a state. And it clearly follows, from its sovereignty, independence, and exclusive jurisdiction, that all questions regarding the acquisition, possession, enjoyment, transference, transmission, or disposal otherwise, of the immoveable property in that country, lands, dwelling-houses and other buildings, erections, or structures, attached to the ground, must be regulated by the laws of that country within which these lands or properties, forming part of, or attached to, the territory, are immoveably situated, not by the laws of any other country. The immoveable nature of the object of the right, its situation, and the absolute sovereignty and exclusion of the interference of foreigners which each state must have within its own territory, for its own safety and independence, preclude any other rule.

The moveable effects, again, which are subservient to the subsistence, clothing, and other wants and comforts of mankind, have not, like immoveable landed estates, any fixed seat or position in the place where, in point of fact, they may happen to be for a time; they are connected with, and in a manner dependent on, the person of the individual to whom they belong; and they are subject to his disposal, and to any destination he may choose to give them. In a rude or early agricultural age, the moveable wealth bears a very small proportion to the landed wealth of a nation, consisting chiefly of personal clothing and dress, household furniture, and ornaments; the annual crops of grain and other vegetable produce; and the animals, which are so far tamed and reared from time to time. There do not, then, exist the large mercantile, manufacturing, and banking capitals which are accumulated in the course of ages, and in the progress of civilisation. Moveable effects are thus, in these early times, viewed as very secondary to landed estates, and as attached

and subservient to the person of the owner. And even afterwards, at a more advanced stage of civilisation, in the course of the various exchanges, which become necessary in the intercourse of life, it is found convenient, and for the general welfare, that the rights to such moveable effects should be held to be regulated, not by their own position, so constantly liable to change, as by the permanent situation of their owner.

Nor ought this to be called a fiction of law. * Such fictions are not admissible in general law, or jurisprudence, national or international, but only in positive consuetudinary civil law, to enable the judge, without the intervention of the legislature, to correct the hardship of a rule, which was once found useful, and was established by usage, but which, in practice, has become hurtful. The rule or practice of holding rights to moveables, to be regulated, not by the situation of these moveables, but by the domicile or permanent residence of the owner, has obviously arisen from the physical difference between them and immoveable landed property, and their early intimate connection with, and subservience to, the use and disposal of the owner. Accordingly, when this intimate connection between the person of the owner and the moveables, as an accessory, does not exist, or is not the point at issue, the rule of practice just referred to does not take place. It takes place only where the moveables appear as an accessory to the person of the owner, as in the succession *ab intestato*, in contracts of marriage, in uni-lateral deeds *inter vivos*, in deeds of a testamentary nature. But it is not applicable where this intimate connection with, and subserviency to, the uses of the owner, do not exist, or are not the points at issue; as where the property in moveables is claimed and contested, where an appeal is made to the maxim, that the fact of possession of moveables constitutes a good title, where one exercises the right of pledge, or any of those rights of execution, which prohibit the alienation of, and attach and transfer moveables by ultimate adjudication or confiscation. In such cases, moveables are viewed as the objects of real rights, and the *lex rei sitæ* is the rule.

So much for rights to things moveable and immoveable. The other class of rights are rights to the actions of other

men, styled services by Mr. Bentham, and denominated obligations, undertaken or incumbent on others, by M. de Savigny. These rights arise from so many juridical relations consequent upon original position and circumstances, or created by human actions and other subsequent events. These juridical relations may be either particular, occasional, and temporary, or comparatively general and permanent.

Occasional and temporary juridical relations arise from the uni-lateral acts and deeds of individuals—legal, such as acts for the behoof and interest of others, without express authority or *negotiorum gestio*, deeds *inter vivos*, and deeds of succession—or illegal, such as delinquency or violation of civil right, involving the obligation of restitution or reparation; or from the bi-lateral acts and deeds of individuals, such as the numerous class of conventions or contracts.

Uni-lateral deeds *inter vivos*, or of succession, chiefly gratuitous, are obviously to be construed, and their import and effect to be determined, according to the laws of the country where the granter or disponent has been born and resided, or has taken up his permanent residence, the *lex loci originis, vel domicilii*, as being the only laws, with which he can be presumed to have been acquainted, or to have had in view. If such deeds relate to the disposal of immoveable property in a foreign country, the execution of the will of the deed must bend and yield to the primary rule which, we have seen, the independence and safety of nations has imposed in relation to property forming part of their territory. If the deed requires its execution in a foreign country, that execution must be effected agreeably to the law of that country, because the granter, by the special terms of the deed, obviously had that law in view. When the uni-lateral act is a delinquency or violation of right, the reparation ought to be determined in, and according to the law of, the country where the violation has taken place, because the fact of the violation can there be best substantiated or disproved,—because the amount of reparation can there be most correctly ascertained. When the uni-lateral act is for the behoof of others, without express mandate,—as in the *quasi* contracts, in uni-lateral engagements or authority, and in gratuitous deeds of succession, the law of

the domicile of the party binding himself, and of the testator, is the rule of interpretation for ascertaining the validity of the deeds, as being obviously the law to which the parties looked.

With regard, again, to bi-lateral deeds or contracts, their validity in point both of form and of substance, must, in general, be determined by the law of the country where they are entered into and concluded; because that is the law which the parties must be presumed to be acquainted with and to have had in view, except in the case of both parties being of the same nation, when, although the contract be entered into in a foreign country, the parties are presumed to have had in view the law of their own country, as being that with which they are best acquainted. Where the parties are of different nations, the law of the country where the contract has been entered into is still the rule; because the foreigner, if he does not stipulate otherwise, must be presumed to have had in view the law of the country where he transacted the business, and where the contract was best understood, and could be most effectually proved and enforced.

When the parties either expressly, or by implication virtually agree, that the contract is to receive its execution in a foreign country, as by the delivery of the goods purchased, by the payment of the stipulated price, the law of the country where the execution or fulfilment of the contract is to take place, must be the rule, because such is the law according to which, the parties have agreed the contract should be enforced. Agreeably to these principles, in bills of exchange, the form and validity of the draft and indorsation are regulated by the law of the country where they are made; and the acceptance and the payment, by the law of the country where the former is granted, and the latter is to be made.

With regard to the incidental consequences of contracts, as distinguished from their immediate effects, arising from *mora* or delay, negligence, or other failure or culpability, in the performance of what has been undertaken, they appear to be regulated by the law of the country where the acts or omissions occur, that give occasion to them.

The other branch of the class of rights to the actions of

others, the comparatively general and permanent, comprehends those which arise from permanent juridical relations, chiefly created by marriage, by birth, and by death; such as the reciprocal rights of husband and wife, parent and child, and of the other individuals more distantly related, or connected by blood, namely, kindred — denominated by M. de Savigny the law of family, and the law of succession.

As being a contract, marriage, so far as regards its celebration, or the mode in which it is entered into, appears to be regulated by the law of the country, in which it takes place, by the *lex loci contractus*. When the parties go from home to a foreign country, to be married, merely for the purpose of eluding the observance of the forms prescribed in their own country, the majority of writers on the subject appear to hold the marriage invalid. But the opposite is perhaps more correct, inasmuch as the intention, will, or consent of parties, cannot be much affected by the validity of extrinsic forms; and so it seems to have been settled in Great Britain. But where the validity of the marriage depends upon the intrinsic solemnities, or requisites, such as the personal capacity of the parties to enter into, or consummate the contract, it appears to be regulated by the law of the nation to which the parties, or either of them belong, the *lex domicilii*.

With respect to the patrimonial interests of the husband and wife, so far as not arranged by the marriage contract, the conjugal society, or communion, appears to be regulated by the law of the domicile of the husband at the time of the marriage; subject always to the special exception of immoveable property, for the paramount reason before stated. And according to the opinion of most writers on the subject, Mr. Justice Story however dissenting, this conjugal partnership with regard to estate or property, does not appear to be modified by any subsequent change of domicile or nationality. For it would certainly be not very consistent with justice, to permit the husband, who has the power of changing the domicile and nationality of his wife, as well as his own, thereby to modify, for his own personal advantage and profit, the patrimonial interest of the wife in the conjugal partnership, as fixed at the time of the marriage.

With regard again to the dissolution of the marriage by

divorce on the grounds of adultery, desertion, or other failure to discharge the duties of the husband or wife, it does not appear that this matter has any necessary or essential connection with the law of the country, where the contract was entered into. It rather appears this matter should be regulated by the law of the country, where the parties have all along had their permanent residence, or where the acts or omissions, which justify the divorce, have taken place or occurred; as in the case of the incidental consequences of ordinary contracts, arising from delay, negligence, or other culpability. And as to the peculiar doctrine of the English law, that a marriage contracted in England is indissoluble by any court of law, it is manifest that such a marriage is not absolutely indissoluble; for it is admitted that such marriages may be dissolved, even in England, by an act of the legislature. And the legality of divorce for adequate reasons being thus recognised by the legislative practice of England, it does not appear there are valid grounds in law, for other countries being held bound to give effect to this qualified indissolubility of a marriage contracted in England,—to this singular and peculiar institution of England, apparently less calculated for ascertaining the real grounds for divorce, than a judicial investigation, or why the courts of other countries, where the parties reside, or where the acts or omissions justificatory of the divorce, have been committed or occurred, should not pronounce a decree of divorce, after due inquiry and ascertainment of the facts, agreeably to the law recognised in these countries.

The rights of the children of the marriage, when not determined by the marriage contract, or other deeds of settlement, are, of course, regulated by the law of the country where the parents have had their domicile, and where the children have been born and had their residence, the children, upon the death of the parents, becoming invested with the estate of the parents, either by continuation of a sort of joint right of property to a definite extent, or by a right of succession. And the rights of the children or grand-children, and of the collateral kindred, whether the succession be testate or intestate, are in general regulated by the law of the country

where the testator, or the deceased, had his domicile. If the estate of the deceased embraces lands, houses, and other buildings constructed on lands, we have seen the succession is regulated by the law of the country where these material objects are situated, under a rule deemed necessary for the independence, safety, and welfare of nations. But if the estate succeeded to consists of claims of debt or moveable effects, the law of the country or domicile of the deceased person, is the rule, from moveables having no permanent situation, and being considered as accessory to persons.

In a former part of these observations, we trust we succeeded in shewing that private international law did not rest solely and entirely on the *comitas gentium*, or courtesy of nations; but that, in their commercial and other intercourse, nations incurred juridical or legal obligations susceptible of enforcement; that after admitting and engaging in such commercial intercourse, civilised nations became bound to give the aid of the machinery of their internal judicial establishments to foreigners, for the enforcement of their well-founded claims, and that a refusal to do so afforded, and amounted to, a just cause for war.

As to the existence of such a compulsory right, there seems to be no room for doubt or dispute. The only difficulty is to ascertain to what extent this compulsory right goes. And here, we do not propound the compulsory right, as extending beyond reciprocity. At the same time it is manifestly for the interest of all nations to carry the reciprocal aid afforded to foreigners by their respective courts of law, a great deal farther. And we may shortly notice what progress has been made, in this respect, by the civilised commercial nations of Europe. As during the natural and ordinary condition of peace among civilised nations, the rights of the subjects of one state can only be enforced against the subjects of another, through the courts of law of the latter state, the subjects of the former must of course resort to the tribunals of the foreign nation; and the rule of the Roman law holds, *actor sequitur forum rei*. And as judicial establishments, in the progress of civil society, are entirely an internal institution of each nation, the forms of judicial procedure are of

course regulated by the law of the country where such establishments exist, and where the demand and application to them are made. Any other rule would be manifestly inconsistent with the sovereignty and independence of nations.

A foreigner may be a plaintiff against a native, or denizen, or subject of the realm; and, in such an action, the foreigner is usually required to find security for expenses of process, in order to protect the subject against rash actions undertaken by foreigners, who, after having failed or succumbed in their suits, would not afford, or leave, the defendant any means of obtaining re-imbursement of the expenses thus groundlessly incurred by him.

By the law of nations, as recognised in almost all the countries of Europe, foreigners are likewise held entitled to apply for the intervention of the judges of every country, even against other foreigners. But in such actions of one foreigner against another, the defendant is not authorised to exact security for expenses. In actions against foreigners as defenders, the generally recognised maxim, as before observed, is, *actor sequitur forum rei*. But to this general rule there are in different countries several exceptions, or rather, perhaps, additional grounds for holding foreigners amenable to courts of law; such as the *forum rei sitæ* (founded in the possession of immoveable property), the *forum contractûs*, the *forum arresti*, the *forum administrationis gestæ*, the *forum reconventionis*, the *forum connexitatis causarum*, the *forum concursûs creditorum*. But, in sustaining such grounds of jurisdiction, judges ought, of course, to see that due measures have been taken for giving the defender sufficient intimation of the demand, and that he be allowed ample time for urging his defence.

When the parties, foreigners and denizens, or subjects of the realm, have made appearance in court, and joined issue, or *litis contestatio* has taken place, the proceedings in the suit must obviously be regulated in point of competency by the law of the nation which has established the tribunal; and here the chief step towards the judgment, when averments in point of fact are disputed, is the proof by the parties of their respective statements by legal evidence,

This evidence has been recognised among the civilised nations of Europe, as consisting, 1st, of writings, formal, judicial or extra-judicial deeds, private writings, books of merchants, &c. ; 2dly, of parole proof, or by witnesses, generally admitted, where it is not to set aside, or add to, formally concluded deeds or writings ; and, 3dly, of oath of party upon reference. When there is a *conflictus legum* in proof by writing, the law of the country where the formal deed was executed, or the less formal writing composed, or the merchants' books kept, must be taken as the rule ; and, in the case of parole proof, and of presumptions being founded on, the rule must be the law of the country where the contract was entered into, or other business transacted ; where the facts to be proved took place, when the admissibility or credibility of witnesses is questioned ; or where the presumptions appear to have been established, and so generally known as that they could not fail to have been in the view of the parties.

Any unusual, or extraordinary, or *ex facie* groundless refusal by a foreign court of any of the generally recognised modes of proof, seems, among the civilised nations of Europe, to constitute a ground of national complaint, and of *retorsio juris*, if not of actual hostilities.

Commissions by the courts of law of one country to obtain information from the judges of the courts of law of foreign countries, with regard to the competency and grounds of the judgments pronounced by the latter, which the former are called upon to enforce, are frequent among the European nations ; and commissions by courts of law to take proofs by witnesses, foreigners, or resident in foreign countries, and for the recovery of writings, are still more frequent, in some cases unavoidable, and in general useful, where there is no better mode of obtaining evidence.

Provisional measures for the security of the creditor, before the action is instituted, or before the judgment is pronounced, are likewise recognised by the civilised nations of Europe, such as the arrest and imprisonment of the person of the foreign debtor, till he find security, the seizure or attachment of his effects, or of the debts due to him, and the prohibition against his alienating his immoveable property. Questions respecting the expediting or engrossment of judgments are

obviously to be determined by the law of the country where they are delivered or demanded. Where registration is required as a mode of publication, as in the changes of immoveable property, in the constitution of hypothèques, exclusive privileges, or other real rights, the formalities of the registration are to be judged of by the law of the country where the immoveable property alienated or burdened is situated, not by the *lex loci contractûs*. The registration of a company must take place and be judged of, where the company has its seat, as also the publication of the dissolution of the co-partnership. The publication of a failure or bankruptcy must be made and judged of according to the law of the country where it has openly taken place.

But of all the international questions of a judicial description, the most important are those which concern the effects or the execution of the judgments pronounced by the tribunals of a nation, in foreign countries. And, no doubt, the sovereignty and independence of states appear to require that no foreign judgment should be put in execution, without the sanction and authority of the judges of the country where the execution is to take place. From this, however, it by no means follows, that any nation or its judges are entitled to consider the authorising such execution as a favour, which they may grant or withhold according to their good pleasure or caprice, or absolutely and unconditionally refuse. Such an arbitrary power is not necessary for the independence or safety of any nation. Indeed, the laws of different countries appear to differ only on the question, whether the authority for the execution of foreign judgment should be granted simply upon application being made, or only after a thorough revision of the whole contested matter. That a previous inquiry to a certain extent may be necessary for the welfare as well as safety of the foreign nation, is not disputed. But what are the limits of this inquiry? Should it be limited to competency, assuming the legal correctness of the foreign judgment? or should it include an examination of its merits, to ascertain if justice has been done to the subjects of the realm?

Now, no state, it seems plain, is entitled to insist on the judgments of its tribunals being executed, or receiving effect

in a foreign country, except for the protection and the free exercise of the rights of its subjects, and for the performance of the legal obligations, which the subjects of the foreign state have incurred to them, by contract, or from other legitimate causes. The different modern international jurists, from Vattel downwards, propound the following conditions, as necessary to entitle a nation to have the judgments of its courts of law enforced in a foreign country. 1. That the Court shall have been of competent jurisdiction, whether according to the nature of the litigation, or in virtue of conventions, express or tacit, between the two nations. 2. That the pleader for the foreigner shall have been heard, agreeably to the forms prescribed by the laws of the country where the cause has been adjudicated; and that on a footing of complete equality with the subjects of that realm, he shall have had the means of recourse to a higher tribunal, in all cases where that recourse is permitted. 3. That at bottom, and on the merits, the cause shall have been judged according to the laws of the country; and that the decision be final and in the last resort. When these three conditions are united, it is held by these international jurists, that a second process upon the same grounds, or for the same cause, ought, in all countries, to be rejected and dismissed, by the *exceptio rei judicatæ*, whether the party who has been unsuccessful be a subject born in the country where the sentence has been pronounced, or has there simply established his residence.

To these conditions, laid down by the modern international jurists, we add the principle of reciprocity; not that such a principle can entitle a nation, which adopts the more liberal practice, to compel another to adopt that practice, but simply that the nation which observes the rigid practice, must submit to the same practice being adopted by other nations in their conduct towards it: — *Quod quisque juris in alterum statuerit, ut ipse eodem jure utatur.*

Nay, we go farther with M. Fœlix, and add the following conditions: — That to entitle a nation to have the judgments of its tribunals given effect to, in a foreign country, these judgments must contain nothing contrary to, or inconsistent with, the sovereignty of the foreign nation, or the public law

of the state, or its legitimate national interests, or with the competency of its tribunals, or its revenue laws; nothing sanctioning slavery, or polygamy or incest, or other crimes or offences; nothing sanctioning what is specially prohibited by the laws of the foreign country, such as lotteries; nothing contrary to the public law of nations, such as furnishing arms and other military stores to the enemies of the nation.

But upon the preceding conditions, and with the preceding exceptions, we humbly conceive a nation is legally or juridically bound, and may be compelled by physical force, to give effect to the judgments of foreign courts of justice. In consistency with his general theory of private international law, having no other foundation than the *comitas gentium*, M. Fœlix maintains, that the rule we have just been considering, which he finds so generally recognized, not only by the jurists who have written professedly on public international law, but also by the internal regulations, and practice of a number of nations, ought to be ascribed to, and the motive or reason for the adoption of such a common principle, to be sought, not in theories *à priori*, but in considerations of *comitas*, translated "*bonne amitié*," and of reciprocal convenience (*ob reciprocam utilitatem*), which have determined nations to depart from the rigour of the law.

While, however, we concur with M. Fœlix, in disapproving of theories *à priori*, and in inculcating the cultivation of feelings and considerations "*de bonne amitié et de convenance réciproque*," we must still dissent from his opinion, that private international law has not another and a stronger foundation. We disapprove, as well as he, of what he calls theories *à priori*, founded on fiction, such as the social contract of Rousseau, which never had, nor could have any existence or obligatory force. But, when we find theories founded, not on fictions, of the imagination, but on actual observation of phenomena, of particular facts and events, on logical generalisation and arrangement, and on correct induction in the science of law, such as the latest and greatest work of M. de Savigny exhibits, we cannot reject, as theories *à priori*, the productions of such original genius and profound thought. We cannot help thinking that M. Fœlix, to whose abili-

ties, learning, and laborious researches, the students of international law are so much indebted, has here allowed his otherwise just disapprobation of fictitious theories *à priori*, to carry him too far, and that he has been led to form too limited and narrow a notion of what he calls the strict or rigorous law, as founded on the sovereignty, independence, and exclusive jurisdiction of nations. And we submit, as the result of our investigation, that under the conditions and exceptions before specified, the obligation on a nation and its tribunals to give effect to the judgments of the tribunals of a foreign nation, rests upon the same legal principles, the same juridical relations, as are the foundation of the greatest part of the laws, recognised and enforced by the machinery of the judicial establishments in the interior of civil societies.

Even with this more definite and firm foundation for private international law, there is still ample field for the exercise of that "*bonne amitié*," and regard for "*convenance réciproque*," of which, along with M. Fœlix, we beg earnestly to recommend the cultivation. For, while we do not urge the legal, or juridical basis of private international law, farther than the principle of reciprocity, *quod quisque juris in alterum statuerit, ut ipse eodem jure utatur*, we find that in giving effect to the judgments of foreign courts, there is a difference in the actual practice of nations. Nay, we find from the learned researches of M. Fœlix, that, according to their internal regulations and practice, the difference is very considerable in the measure and extent of the peaceful, judicial, reciprocal aid given by the courts of law of the different European states.

The British courts, without requiring reciprocity, and assuming, or taking for granted the rectitude, on the merits, of the judgment of the foreign tribunal, with a laudable liberality, do not inquire into the merits of the cause, but merely when applied to, and satisfied of the competency of the court and proceedings, interpose their authority, so far as necessary, for carrying into effect and executing the judgment, by the compulsion of personal constraint, or attachment of property, moveable or immoveable.

In France, and in the other countries which have adopted

the recent legislation of France, such as Belgium, Rhenish Prussia, Rhenish Bavaria, Rhenish Hesse, the Low Countries, Tuscany, the kingdom of the Two Sicilies, where the judgment of the foreign court is adverse to a Frenchman, or subject of the other states just mentioned, the courts of law refuse to interpose their authority, unless the judgment be opened up, and the whole cause examined and debated anew on the merits. Whether this be a suitable fulfilment of the reciprocal obligations of private international law, we shall not here stop to inquire. It rather appears a nation cannot be legally or juridically compelled to adopt the more liberal rule upon the principle of reciprocity, beyond the *retorsio juris*. But it might be for the interest of the inhabitants of the countries just mentioned, that their courts should not in such cases require a new trial on the merits, and thereby expose these inhabitants to a *retorsio juris*. And it seems strange, that so civilized, so polite, and so great a nation as the French, should not have adopted a more liberal policy.

Among the smaller states of Germany, upon the condition of reciprocity, the reciprocal execution of the judgments of their respective courts of law, was the ancient common law, and is the present practice. In Austria, and the Lombardo-Venetian kingdom, in Prussia, in the kingdoms of Bavaria, Würtemberg, Hanover, and Saxony, in the Grand Duchies of Baden, and of Hesse, and in the Duchy of Brunswick, the same principle of the reciprocal execution of the judgments of foreign tribunals prevails, under certain conditions very similar, and of which the chief are, reciprocity in the observance of this rule, and the competency of the foreign tribunal. In the majority of the Swiss Cantons, the German principle of reciprocity appears to prevail. At Geneva, it appears, the parties must be again cited and heard, unless otherwise regulated by treaty. In Denmark, the practice is to suffer the execution of foreign judgment, under the twofold condition of reciprocity, and the competency of the court, by which the judgment has been pronounced. In the Pontifical states, the execution of foreign judgments is granted under the conditions of reciprocity, and of the sentence having acquired the force of a *res judicata*. In the kingdom of Sardinia, the execu-

tion of foreign judgments against subjects is supported on the condition of reciprocity, competency of the foreign court, regularity of procedure, and the absence of any grave or evident injustice.

The other states of Europe, besides those before noticed, without having adopted the recent French legislation, do not appear to recognise the principle of reciprocity. Thus in Spain and Portugal, the foreign judgment seems to be admitted, merely as an article of evidence in a new trial. In Russia, the judgment of a foreign court does not seem to have any execution, except after a new and thorough investigation of the cause. In Sweden and Norway, the foreign judgment seems merely to be admitted as an article of evidence in a new action.

Even where the laws of the different countries happen to coincide, as sometimes happens, the less liberal system of judicial administration is productive of a great hardship, the delay and expense of a new trial on the merits. And this hardship is more grievous, where there is a *conflictus legum*, and there is room for the discussion of the additional question, of which country ought the law to preponderate and predominate, as the rule of decision. Nay, the opening up of the foreign judgment, and the requiring of a new trial in favour of a subject of the realm against a foreigner, may frequently have the effect of absolutely defeating the ends of substantial justice. The farther discussion of the law of the case, indeed, may only increase the evils of delay and expense; while, at the same time, with ordinary fairness the application of the law to the case is likely to be best understood in the country where the transaction took place. But, with regard to the facts of the case, it may frequently be quite impracticable, from the death or absence of witnesses, and from the loss of documents, to adduce again the same or equivalent evidence.

In considering the doctrines of private international law, where there is a *conflictus legum*, as applicable to the claims of civil right arising from the illegal acts of others, as giving rise to the obligations of restitution or reparation, we saw that the delinquent might be prosecuted in the *forum*

delicti, and judgment pronounced according to the *lex loci delicti commissi*. And there does not appear to be any valid reason why the person who has suffered from the illegal act, should not be allowed to insist against the delinquent in the *forum domicilii*, or even in the *forum deprehensionis*.

Where the illegal act is of a heinous nature, an offence or crime, such as to warrant punishment on the part of the Community, Government, or State, or on the part of another nation or state, the natural and ordinary rule seems to be the law of the country where the crime is committed, where the law has been violated, and where the evidence of the criminal act can best, if not solely, be obtained. And here we agree with M. Fœlix in thinking that a branch at least of what is usually called Criminal law, may be correctly enough held to belong to private international law. For we do not view criminal law as always, or entirely a part of the Public or Constitutional law of a state. So far as offences are directed against the state, or punished merely at the instance and for the behoof of the state, the criminal law clearly belongs to the public or constitutional law. But so far as offences are prosecuted merely for preventing in future, or making reparation for the infringement or violation of the rights of private individuals, we conceive such procedure belongs to the private law of a nation. The machinery employed for such purposes — the judicial establishment — is, no doubt, the creation of the social union, and proceeds from the state or government. But so does the judicial establishment for the ascertainment and enforcement of the civil rights of private individuals. And if the latter be admitted, as a part of the private law of a state, so also ought the former.

When a state admits foreigners into its territory for commercial or other purposes, it becomes bound to afford them protection in permitted matters of intercourse, a juridical relation or *rapport de droit* being thereby created. On the other hand, foreigners are bound to observe the laws of the country into which they are admitted. And every foreigner may be prosecuted in a country or state, where he has a temporary residence, for crimes or offences committed by him within the territory of that state. Different states by their internal laws regulate the punishment of crimes and of-

fences in different ways; and they may do so without any infringement of the rights of other nations. If a native, or other subject of a state, be accused of having committed an offence in a foreign country, his government is entitled to insist on his having a fair trial according to the laws of that country.

It does not appear, that, as a general rule, there is ground for prosecuting in one state a foreigner on account of an offence perpetrated by him in another state, unless that offence has been productive of injury to the former state, or its subjects. But where a prosecution takes place in a state, other than that, in whose territory the offence to be punished has been committed, the law of the country where the prosecution is instituted, appears to be the rule.

No state authorises the execution within its territory of judgments pronounced in criminal matters by foreign tribunals, against the person or the property of an individual, so far as regards the penalty and its accessories. It is otherwise with judgments merely awarding civil reparation.

Opinions differ on the question, whether the law and usage of nations bind each state, when required by another state to deliver up the person of an individual accused of an offence or crime, committed in the territory of the latter state. In what may be denominated private criminal law, in ordinary crimes or offences, directed against the persons or properties of private individuals, such as murder, robbery, theft, when a suspected criminal escapes from his own country, other states seem bound to give him up for trial in his own country, or at least not to give him an asylum. And it does not clearly appear upon what valid, legal, or juridical grounds a government can refuse to deliver up the accused person for trial in his own country, or persist in affording him an asylum, or can, in virtue of its sovereignty and independence, have a privilege to protect a common murderer, robber, or thief.

In what may be termed public criminal law, in crimes or offences directed against the state, or existing government, in which the illegality of the act may appear doubtful, and which may involve political questions between nations, the obligation to deliver up the accused does not appear to have been

recognised. And there appears to be ground for the distinction.

We have thus rapidly run over most of the cases and questions between the citizens or subjects of different states and governments, in which a *conflictus legum* has occurred, or is likely to occur; and we have not found any occasion to resort to what are called the personality or reality of statutes, laws, and usages, or to any other considerations, than those which we recognise in the growth and development, and in the exposition of the internal common law of states. We have endeavoured to show that private, as well as public international law, rests upon principles more definite and stable, than the mere comitas or courtesy of nations, dependent on their good will and pleasure; namely, upon what the Romans called the *ratio juris*, upon juridical relations, which arise in the course of their mutual transactions and dealings with each other. And this we conceive may be done, not by reasoning *à priori*, or by any arbitrary supposition or fiction, such as a state of nature, which never had any existence; but by an appeal to actual observation, experience, and reasoning, *à posteriori*—by an induction from the particular cases in which the juridical relation takes place; upon the perception of which, there is observed uniformly to arise in the minds of men from their natural constitution, a feeling of what is just or unjust in the circumstances, a judgment of what individuals have a right, or are entitled to do, in the use of compulsion by physical force or otherwise. And the conclusion we thus deduce from the uniformity of the feelings and judgments of mankind in particular cases, namely, distributive justice, reciprocity or liberty of action, limited by the condition of all other individuals having the same liberty, will be found to be confirmed by, or to be coincident with, the general welfare of the individuals contemplated, or with universal expediency.

It is essential that the sovereignty, independence, safety, and security of nations be maintained; and that for this purpose a jurisdiction, exclusive of all foreign dictation, should be recognised within their own respective territories. But there is no occasion for pushing this sovereignty and exclusive

jurisdiction to such an extent as to maintain that nations, and the individuals of whom they are composed, cannot incur any legal or juridical obligation, susceptible of physical enforcement against them, except of their own free will and pleasure. That the tenure, possession, enjoyment, transference, disposal, and transmission of the various immoveable properties of individuals, forming parts of the territory of the state, should be entirely regulated by the law of that state, is sufficiently obvious. But that it may be not only consistent with, but also necessary for, the attainment of many of the substantial purposes of compulsory justice in the general and particular, and, especially, in the commercial intercourse of the individuals of different nations, that the laws and judgments of the tribunals of foreign states should be taken into consideration and receive effect, appears to be almost equally obvious. And in thus giving effect to the laws and judgments of the tribunals of foreign states, it is manifestly not the personality or reality of these foreign laws, but the constitution and connexions of the individuals who are interested as parties, the circumstances in which they are placed, and the laws which they had in view, and by which they intended to abide and be regulated, in entering into their various bi-lateral transactions or conventions, and in executing their various uni-lateral deeds *inter vivos* and testamentary, that are to be regarded, inquired into, ascertained, and recognised as guides in pronouncing judgment.

ART. IV. — REPORTS OF THE SOCIETY FOR PROMOTING THE AMENDMENT OF THE LAW.

COMMITTEE ON EQUITY.

Reference made to this Committee : —

That this Committee be requested to direct their valuable labours to the consideration of whether any further alterations can be made in the whole system of the Jurisdiction, Practice, and Constitution of the Masters and Masters'

Offices, with a view to a more speedy and cheap administration of Justice in the Court of Chancery.

REPORT.

The present reference to this Committee impliedly alludes to Reports previously made by them upon some of the questions relating to the practice and constitution of the Masters and Masters' Offices. It seems, therefore, desirable to preface the present Report by a few observations tending to point out the connexion between it and those which have preceded it.

The forms of proceeding in the Court of Chancery have from a very early period been marked, among other peculiarities, by two important characteristics: —

1st. They endeavoured to provide for the complete settlement of each question brought before the Court between all persons in any way concerned in it.

With this object they not only required the presence of every body interested in the subject matter under litigation; but they allowed of repeated hearings of the same cause, until all questions capable of being raised in it were disposed of; and they provided machinery for making all the varied inquiries needed, in order fully to ascertain all possible points in dispute between all the parties interested in the subject matter of the cause, and thus prepare the way for a complete adjudication upon it.

2dly. They enforced from each defendant, under certain restrictions, a discovery of whatever he knew in support of the plaintiff's claim.

Now, valuable as these characteristics are in themselves, nevertheless the cases to which they have been applied, and the mode in which they have been carried out, have given rise to much, and, as this Committee consider, well-founded complaint.

And first in respect to the cases to which this system of procedure has been applied.

The facility of inquiry possessed by the Court, and the completeness of its decrees, which this power alone makes possible, have turned it into the instrument by which

accounts are taken; and property administered between legatees or creditors.

It appears from a statement made by Mr. Field¹, that out of 315 causes instituted from his own office, 132 were for the administration of trusts, 31 were creditors' suits, and 7 suits to take the accounts of agents; while of the rest, 21 were foreclosure suits, where the only question usually is one of account. In 191 out of these 315 suits, then, it is probable that the only object of the parties was to have accounts taken, and inquiries made through the medium of the machinery provided by the Court in the Masters' Offices. Again, a return furnished to the Chancery Commissioners shows that, out of 727 suits heard in the years 1822, 1823, and 1824, for every four of the bills where the allegations were contested, there were nine where they were not²; in most of which, probably, the sole object of the suit was to have some inquiry made before the Master.

Yet in all these cases, the use of the forms of pleading adapted to enforce discovery, or to bring litigated points under the notice of the Court, forms the expensive and tedious, but only mode of getting into the Masters' Office, where the real cause, in fact, commences.

But if the forms through which the Court of Chancery compels its suitors to proceed to obtain inquiry into their cases, are in many instances objectionable, still more is the manner in which these inquiries are conducted open to objection. The length of time consumed in them was one of the most prominent subjects of complaint before the Chancery Commissioners; a complaint, in their opinion, not unfounded³, though in many cases unjustly directed against the officers before whom the inquiry was conducted; for, as the Commissioners observe, the progress or termination of references was rarely affected by any conduct of the Masters or their clerks, but depended upon causes over which they had not, up to that time, had even a nominal control.

¹ Observations of a Solicitor on Defects in the Offices, Practice, and System of Costs in the Equity Courts, 1840, p. 83.

² Appendix to Report of Chancery Commission, 1826, p. 1147. Of these causes, 493 were heard on bill and answer, and 234 only on evidence.

³ Report of Chancery Commission, p. 19.

That, notwithstanding the changes made in consequence of the recommendation of the Chancery Commission, complaints of the same nature still continue, is notorious; and that, in the opinion of this Committee, there is still foundation for making them, is sufficiently apparent from their two former Reports; while the cause of the grievance seems to them attributable in great part to the same want of authority in the Masters over the matters brought before them, which the Chancery Commissioners regretted and endeavoured, though unsuccessfully, to supply.

This want of authority manifests itself in a variety of cases, which appear reducible to the three following heads:—

1st. The Master is considered as bound merely to carry out the inquiries directed by the Court, in the manner directed by it, and with certain limited powers given him by its general orders, but without possessing any discretionary authority to originate inquiries or give directions; however necessary the inquiry to the purposes of the suit, or however desirable the direction for the better prosecution of the inquiry directed. Thus, in a pamphlet generally attributed to Master Senior¹, we are told of a Master declining to proceed in the discharge of an executor and devisee, because the decree, though it contained a reference as to the real estates sold, contained none as to the application of the monies. He conceived, and apparently correctly, that he had no power to supply the omission.

Other cases of inconvenience arising from this cause are mentioned in the same publication.

Thus, where conflicting evidence as to the value of property is adduced before the Master, he is unable to employ a surveyor, appointed by himself, whose testimony might be impartial; because he has no power to direct by whom the expense shall be borne.

Again, however complicated an account may be, he is still destitute of the power, which one proposition of the Chancery Commissioners recommended that he should have,

¹ Facts and Suggestions respecting the Masters' Offices, p. 37.

of calling in the aid of an accountant to unravel its perplexities.¹

Nor if he have omitted in the commencement of an inquiry to direct that the matters requiring evidence shall be proved by affidavit, or to make his direction sufficiently comprehensive, can he afterwards direct that affidavits shall be received.

From this want of original jurisdiction, often arises a further increase of cost to the suitor, above that already noticed, from the necessity of applying to the Court, and that perhaps repeatedly, in the progress of a cause, to direct the Master to exercise some function belonging to his office, though in a case where to grant the application is of course.²

2dly. The Master's chief duty is only to furnish the superior Judge with such information as he may require for his guidance in making his decisions. Except in a small class of cases, the Master has no authority to act upon the conclusions to which he comes. When the inquiry is completed, application must be made to the Court to confirm and act upon it; though every party interested may be satisfied with what the Master has done, and though the nature of the case be such that the Court has no further direction to give but that the Master's report be confirmed and acted upon.

For this principle is applied not only to that class of cases in which the functions of the Master are principally *inquisitive*, as, for example, upon a reference to inquire as to the heirs or next of kin of A. B., or the state of his property. It is extended also to such references as one to report who shall be the guardian of an infant, or the receiver of an estate, where the function of the Master is *administrative*: and to those cases, where it is *judicial*, as in decisions upon the disputed claims of creditors, or contested items in an account.

¹ Facts and Suggestions respecting the Masters' Offices, pp. 36, 37.

² In the six years ending March 1828, the number of references made on orders were 3·45 for every cause heard; the numbers being 11,697 references to 3393 causes heard. The causes in which references were made at the hearing were 70·29 per cent. of the causes heard, being 2385. P. P. 1828, xx. No. 250., and 1826, xliii. No. 32.

Now, in the two latter classes of cases, the process of coming to the Court to confirm the decision of the Master, although no one disputes it, seems as utterly useless as is the formality before animadverted upon of applying to the Court to direct inquiries to which every one assents; while it cannot be doubted but that both these formalities materially add to the expense, and the former one at least to the delay for which proceedings in Chancery have acquired so undesirable a reputation. Accordingly this Committee have in their first Report suggested that in all suits for the administration of property not involving questions upon which the decision of the Court is sought, the parties should be allowed to go at once before the Masters, who, instead of reporting the results of their inquiries, should, as they now do on applications for further time to amend or answer, decide the questions brought before them, subject to appeal to the Court, but with power to enforce their decisions if unappealed from.

In a subsequent part of this Report, the feasibility of extending this principle to other cases than those referred to in their former Report is considered. But it seems desirable here to state certain facts, whence some idea may be formed of the great amount of useless cost resulting from the present system.

It appears, by the returns appended to the Report of the Chancery Commissioners, that in the three years ending in Trinity Term, 1825, the number of reports, distinguished as requiring labour and professional skill, made by the Masters, were 4728. The certificates and reports of an inferior description, signed by them during that period, were 7852.¹ Now the total number of sets of exceptions heard by the Vice Chancellor, the Master of the Rolls, and the Lord Chancellor, in the three years between November 1822, and November 1825, was 176 only²; so that, throwing out of consideration the certificates and inferior reports, of which, however, probably, many were of a description to require

¹ Appendix to the Report of the Chancery Commission, pp. 562—569.

² Cause Lists, *ib.* pp. 633—1089.; and Paper of Business disposed of by the Lord Chancellor, *ib.* pp. 1115—1128.

confirmation, there were in those three years at least 4550 cases in which the Court, by employing the Master to report instead of empowering him to dispose of the matter brought before him, imposed upon the suitors the cost and delay of two proceedings instead of one.

3dly. The Master, as is shown in the last Report of this Committee, has not sufficient authority over the mode in which the parties coming before him shall proceed. He has not sufficient power to compel them to proceed in their causes with as much expedition as the state of business in his office and the nature of the cause allow. He cannot prevent them from adducing new evidence at any stage of the proceedings previously to the issuing his warrant to prepare the Report, and demanding a review of matters before decided, or from fixing for themselves the times when, and limiting the length of time during which each cause shall be heard; a practice which is found to lead to almost every important cause being heard piece-meal with intervals of several days, and often of a much longer time, between each scene of each act of the performance.

From the returns made in 1836 of the number of warrants attended by counsel in the Masters' Office, it appears that in two of the offices¹, from which alone the returns are made

¹ Returns of Masters Dowdeswell and Sir G. Wilson, P. R., vol. xliii. No. 32. A Return printed in the P. P. for 1828, Vol. xx. No. 259. furnishes some means of estimating the length of time generally occupied upon a reference to the Master. During the six years ending in March, 1828, there were made to Masters Cox, Dowdeswell, Trower, Wingfield, Sir Giffin Wilson, and Stratford, 1453 references under decrees, and 7119 under other orders, *i.e.* on an average 242 references under decrees, and 1186 under other orders, per annum. Of the references under decrees there appear to have been disposed of, in the 1st year after they were made, 91, or 37·60 per cent., in the 2d year 28, or 11·54 per cent.; in the 3d year 26, or 10·74 per cent.; in the 4th year 27, or 11·15 per cent.; and in the 5th and 6th about 7, or 3·94 per cent. The remaining 63, or 21·90 per cent., include, as the Masters observe, many causes, such as administration suits, from their nature always liable to remain for many years in Court, and all the causes compromised or abandoned, of which the Masters, from the nature of the proceedings before them, have no notice. Some idea of the probable number of such causes may, however, be formed from a comparison of the number of causes in which references are made at the hearing, with the number heard on further directions. The first class are, as we have seen, about 70·29 per cent. of the whole number heard. The last were, between Nov. 1822 and Nov. 1825, 42·30 per cent. of the whole number heard; the respective numbers being, 1708 causes originally heard, and 724 heard on further directions (Appendix to Chancery Report, pp. 633—1089.); whence it would appear that about 28 per cent. of the whole number of causes, or 40 per cent.

in such a shape as allows the fact to be ascertained, out of eighteen causes in which more than two warrants were attended, the average intervals between the attendances, excluding all holidays, were in five cases only under ten days, in five others under twenty, while in two of the remaining eight cases, they exceeded seventy days. In two causes mentioned by Mr. Stewart, both prosecuted with diligence, in the one of which there were twenty, and in the other twenty-one distinct attendances, the average interval between each attendance was in the first three and a half, in the second, nine working days.¹

The evils arising from the want of power on the part of the Masters in these respects, and especially from the feature last noticed, viz. from the Masters' Court being one wherein, to use the words of Master Senior, "The suitor, and not the Judge, appoints the times of hearing and deciding," have been fully shown in the Report before referred to; in which, backed by the precedent of the change introduced in Ireland by Sir Edward Sugden, and in pursuance of the suggestions made by Mr. Spence in 1831², and subsequently adopted by other advocates of Chancery reform³, they have proposed the introduction of a system of procedure of an opposite cha-

of the whole number referred to the Master, disappear without coming on for further directions. Of the references under other orders, 965, or 81·36 per cent. seem to have been disposed of in the 1st year; and 119, or 10·03 per cent. in the 2d. The remaining 8·61 per cent. being probably made in causes subsequently compromised or abandoned. The returns from the four other Masters are in a form which makes them not available for the purpose of the above estimate. It is not immaterial to observe, that the practice of making references to the Masters at the hearing has been gradually on the increase. A return made in 1811 (P. P. No. 194.) gives the following per centage of causes heard at the Rolls on further directions, to those originally heard:

Years.	Causes in the General Paper.	Causes in the Consent Paper.	Total of all Causes.
1745—1750	9·823	24·188	13·657
1750—1755	10·831	31·353	16·572
1800—1805	33·361	41·470	35·523
1805—1810	31·334	41·834	33·912

Between Nov. 1822, and Nov. 1825, the proportion had risen to 45·549.

¹ Suggestions as to Reform in some Branches of the Law, pp. 45. 47. See preceding note.

² The Evils and Abuses of the Court of Chancery, and proposed Amendments, 1831, p. 76.

³ See Mr. Pemberton Leigh's speech, on the 5th of August, 1840, p. 24. Suggestions for amending the Practice and Proceedings in the Court of Chancery, 1841, p. 29.

racter, which would empower the Judge, as in other Courts, to hear the causes brought before him in the order fixed by himself, and to continue the hearing of each matter until he had disposed of it; and which would provide that the reviewal of a matter once disposed of should be granted at the discretion of the Judge, and not claimed as of right by the suitor.

This Committee express their unchanged conviction of the desirableness and importance of the principle of the changes thus recommended. They believe that the introduction of a system founded upon those principles would remedy the evils most loudly complained of in the Masters' Offices, and that without its introduction no other change would be productive of much good.

The subjects already considered comprise the principal grounds of complaint respecting the system of procedure in the Masters' Offices. There are, however, two other points deserving of notice affecting the practice of the Court in reference to the Masters. We allude to its practice in suits for specific performance, and in inquiries directed to ascertain whether all proper parties are before the Court. In both cases it is said, and we think not without reason, that the Court often avails itself of the facility of reference to the Master to send before him questions which, either the litigant parties should be required to raise upon the pleadings that they may at once be disposed of by the Court, or the plaintiff should be required to prove before he is allowed to proceed.

To check this practice, as well as to obviate the difficulties before mentioned as occasioned by the want of sufficient authority in the Master, it has been proposed to abolish the Masters' Offices, and increase the number of the Judges of the Court of Chancery, so that they should themselves be able to conduct, at Chambers, all those inquiries which are now conducted before the Master so far as any question calling for judicial decision arose; while such matters as seemed to require only proof of facts might be transacted before officers who should occupy the position of the Masters' chief clerks, but with a more independent sphere of

action. The inquiries now conducted before the Masters, for the purpose of enabling the Court to act upon the assumption of a negative, as, *e. g.* that there are no other members of a class of persons than such as are before it, or no other claims against an estate than such as have been made, it is by this plan proposed to enable the plaintiff to conduct through the medium of some of these officers.

The advantages likely to be derived from this plan may be summed up as follows :—

The Judge, it may be presumed, would be averse to reserving for inquiry at Chambers matters which he could at once dispose of in Court. He would have full power to originate any inquiries, or make any orders at Chambers, not inconsistent with the principle of any previous decree which he might have made in the cause, and his decisions at Chambers would be orders, binding when not appealed from or reheard.

It may be thought, also, that the habits of business learnt in his Court practice would ensure energy in the conduct of business at Chambers; and that from his position, as a superior Judge, he would carry with him greater weight: so that parties, even if they possessed an equal right of appealing from his decisions there as from those of the Master, would be less desirous of exercising it. And in his power over the costs in the cause, he would possess a formidable engine for stimulating diligence or punishing delay.

It has been suggested likewise that facilities might thus be obtained for taking evidence *virâ voce* before the Judge at Chambers, in cases where this mode of examination might seem desirable.

It is clear that there is nothing in this scheme inconsistent, either with the recommendation contained in the first Report of this Committee for allowing certain proceedings to be originated at Chambers without the formalities of Bill and Answer, or with those contained in their last Report respecting the mode in which the business should be conducted at Chambers. But there are objections to the plan which induces this Committee to think that the end proposed may be attained more surely by other means.

It is not, we conceive, clear that the mode of proceeding to which the Judge of a superior Court becomes accustomed in Court is that best fitted for the kind of business which comes before the Master at Chambers. We apprehend that in this species of business, and especially in inquiries conducted after a decree, a readiness to allow cases to be gone into conditionally before all the proof is before the Court, and the rejection of the stricter rules of pleading and evidence is the course best calculated to do justice; a method of proceeding which, in the case of the Commissioners for deciding the claims to the West India Compensation Fund, proved, according to the statement made by Mr. Field¹, so eminently successful, that out of 4136 contested claims decided by them, there arose 22 appeals only, of which 14 were dropped.

Now the present form of proceeding in the Masters' Offices approaches very much to this model. "The Judge," says Master Senior², "sits there as the representative of justice, unincumbered by form; he himself directs the parties how to proceed. If they make any error he corrects their pleadings, he alters in their presence, and with the consent of all parties, their charges and counter-charges until the proper conclusion is drawn, or the right premises are stated, or the real question is presented."

A Judge accustomed to the stricter mode of proceeding proper when a cause comes before the superior Court, even if he did not fall into the error of introducing into the proceedings before him at Chambers a degree of strictness injurious in its operation there, would be under the disadvantage of having at the same time to preside over two judicial systems involving opposite modes of procedure.

But further, there seems to be considerable danger that the Judge might neglect the business at Chambers, which must be often tedious and laborious, and could scarcely ever attract any public interest, and while he directed his principal attention to the more attractive and brilliant labours of his Court, might in fact leave the work at Chambers to the

¹ Observations of a Solicitor, &c., p. 57.

² Facts and Suggestions, &c., p. 42.

staff of inferior officers by whom it is proposed to surround him, and in whom this Committee agree with Mr. Lowndes¹ in seeing the germs of future Masters, only drawn from a class of persons inferior in social position to the class whence the present Masters are supplied.

There is a third point of considerable importance, in which the plan above mentioned appears to this Committee to involve a difficulty, namely, in the appeal from such of the decisions of the Judge as might be disputed—a right which seems to them indispensable, as well in order to preserve uniformity of decision, as to prevent the risk of arbitrary proceedings. The possibility of there being less wish to appeal, has indeed been alluded to as one argument in favour of the plan; but this Committee do not feel much confidence in the attainment of such a result, if the same practice which now prevails of the leading counsel not attending at Chambers should be persevered in; and that this practice must be continued, if the expense of inquiries at Chambers is not to be materially increased, seems to them too clear to need argument. It cannot be expected that, in any important and doubtful case, an adverse decision made in the absence of leading counsel will be readily acquiesced in by the suitor; and it does not seem very probable that the proportion of cases decided by the Judge at Chambers, in which the one party or the other might desire to appeal, would be reduced much below the ratio of one in twenty-six, which expresses the ratio of appeals from the Masters' decisions in the years 1823, 1824, and 1825.² But to whom is the appeal to be made? If to the Lord Chancellor or to any superior Court of appeal in Equity, there would both be danger of overloading the Court with business, and one great advantage of an appeal, namely, that the case has been already fully argued so that the points on either side are clearly understood, would in a great measure be lost. If to the same Judge who had decided the point at Chambers, that would be to appeal to one who had already expressed an opinion on the subject, or, to use the

¹ Delays in Chancery considered by M. D. Lowndes, 1843, p. 17.

² See p. 60, *supra*.

language of Sir Edward Sugden, in speaking of appeals from the Lord Chancellor in his own Court to the Lord Chancellor in the House of Lords, "to appeal from Philip sober to Philip drunk¹;" a circumstance which must often create suspicion that the arguments adduced by the appellants were not fairly weighed, and therefore encourage further appeals to an unprejudiced tribunal. To give the appeal to another Judge of co-ordinate jurisdiction is perhaps the best alternative; yet this might perhaps be thought to compromise too much the judicial dignity, a difficulty avoided when the appeal lies from an inferior to a superior Judge; and would probably lead to a practice of reserving all questions of importance for argument in Court, to the detriment of the suitor, who might be sent from the Judge in Court to the Judge at Chambers, and the Judge at Chambers to the Judge in Court, with much loss of time and money.

It may, perhaps, be urged that the practice of the Judges disposing of business at Chambers has been long tried at law without producing the inconveniences here anticipated. But the cases are not analogous. The business brought before the Common Law Judges at Chambers generally consists of short points easily disposed of, such as applications for further time, for the production of documents, for particulars of demand, for leave to adopt some particular mode of pleading.² There is no staff of officers nominally intended to assist the Judge but who might be in danger of virtually superseding him; and, with the exception of a few cases, where by act of Parliament exclusive jurisdiction is given to the Judge at Chambers, an appeal lies to the full Court, even where the power of deciding at Chambers is expressly given to him by act of Parliament; "though the Court," says Mr. Archbold, "will not, in general, review his order in cases where the matter is left to his discretion, as in the case of a certificate to give the plaintiff his costs under certain

¹ Lord Campbell's speech on his motion for establishing a Court of Appeal, March 1st, 1842.

² See the List in Archbold's Pract. of Q. B., 1044. edit. of 1836.

acts of Parliament, or a decision that an application to set aside proceedings for irregularity is made in time.”¹

The difficulty which might be found in combining the sittings of a number of Judges in distinct Courts, a large portion of whose time would be spent at Chambers, is a fourth point, not undeserving of attention in considering the practical working of the proposed plan; but a graver objection to it, in our opinion, is the increased expense it would occasion; a consideration not unimportant, if it be remembered that the increase, as matters now stand, would fall upon the suitor, to save expense to whom is one great object of the proposed change.

No facts have been adduced to this Committee from which they could infer what increase in the number of Judges would be required. Master Senior expresses an opinion, founded on certain facts adduced by him, that the number of Masters could not be reduced without great public inconvenience.² But, assuming that by an improved method of doing the business at Chambers, and by assigning some part of the work to inferior officers, the six new Judges whom Mr. Stewart proposed to create in 1843³, would be able to do the work now done by ten Masters, the cost of the Court would be increased, since the number of chief clerks would remain undiminished, by 5000*l.* a-year above its present cost, and by 15,000*l.* a-year above what it would cost if the same work were performed by six Masters. If to this there is added the cost of the new assistant officers, to whom part of the duties now thrown upon the Masters is to be intrusted, a considerable addition of expense would be cast upon the suitor.

But the evil would not stop here: the additional cost thus incurred would form a serious obstacle to the formation of any effective Court of Appeal. For the increase in the number of Judges would obviously in no way conduce to this end, since the work which they had to perform in the inferior Courts would be increased in proportion.

¹ Archbold's Pract. of Q. B., ii. 1442. edit. 1847.

² Facts and Suggestions, &c., p. 14.

³ Suggestions as to Reform, &c., p. 52.

For these reasons, this Committee are of opinion that it would be inexpedient to adopt the plan of assigning the work now done by the Masters to the superior Judges of the Court. But in thus deciding against this particular plan, they are by no means inclined to reject the principle involved in it, that, namely, of committing the business transacted at Chambers to persons who shall possess the character and authority of Judges, whose functions they now practically exercise, regulating all matters in their own Courts, and differing from the superior Courts only in the greater absence of formality in their procedure, and in having it as part of their duty to carry into execution decrees pronounced by the higher Courts. In short, instead of making the Judges act as Masters, they think it would be better to arm the Masters with the authority of Judges.

This plan is only a further extension of that proposed in the first Report of this Committee in reference to suits for the purpose of Administration. If the system were complete in both parts, its working would be as follows.

The suitor would in every case (except perhaps applications for an injunction) have two courses open to him. He might go at once before the Master upon a petition in the nature of a state of facts, with the power of bringing any question in the cause before the higher Court by way of Appeal from the Master's decision. Or he might proceed by Bill and Answer, and obtain the decision of the Court upon his case, so far as upon the evidence before the Court it was possible to decide it. This decision might sometimes be final. But often the Court would be unable to do more than to declare generally the rights of the parties. The facts to which those rights had to be applied would not be ascertained with sufficient precision to make a final decree possible. Thus the Court might be able to decide that there was a binding contract, but not whether there was a good title; to decide that a man was liable as surety, but not the exact amount of his liability; to determine the priority of an incumbrancer, but not the extent of his incumbrance. In all such cases, the party in whose favour the decree was made

would have the right of taking it before the Master, there to adduce such evidence as might enable him to apply the decision to the particular facts, subject, as in the former class of cases, to an appeal to the superior Court against the whole or any part of his decision.

In both cases it would probably be found advisable that the Masters in their orders should state the facts upon which they founded their decisions, as fully as is done by their present reports, so that on appeal the facts might be assumed, except where the finding of the Master was specifically objected to.

But in either case the Master should act as an independent judge in a court of his own; when a reference was made to him by the superior Court the cause should be before him, and no longer before that Court. All subsequent applications in it should be made to him in the first instance. He should have full power to originate whatever inquiry or make whatever order he judged necessary to do justice between the parties as fully as the superior Court could do itself, though of course he could not re-hear its decree, or make any order inconsistent with it.

Over the costs of all proceedings before him he should have complete power, with the same restrictions upon the right of appeal for costs as now apply to decisions of the Vice-Chancellors or Master of the Rolls. The costs of the proceedings in the superior Courts it would lie with them to dispose of, either at the original hearing or after the Master had come to his decision on any question referred to him.

The Masters' Courts might also, as they do now, usefully assist the suitors in the superior Courts, by enabling them to carry on preliminary inquiries as to parties in the cases before noticed, where, from the plaintiff having to prove a negative, it is impossible for him to establish his case by evidence in the ordinary way. But these inquiries should not be made under an order of reference from the superior Court. The suitor should be required to satisfy the Court, by the Master's certificate, that the inquiry had been properly made; and he should have a right to apply to the Master to make the inquiry; a right which might well extend to all cases where a

reference to the Master can now be obtained before the hearing.

The forms of procedure in the Masters' Courts might be regulated by orders made from time to time by the majority of the Masters with the approbation of the Lord Chancellor.

It would seem to follow naturally from the proposal of making the Masters Judges, that their Courts, as all other English Courts, should be public, though with a discretionary authority in the Master to hear any particular matters in private; as it would also be a natural consequence of the same plan that they, like other English judges, should habitually state the reasons of their decisions. But, considering the opinion which appears to prevail among the Masters themselves, and is adopted by so competent a judge as Mr. Field¹, "that two-thirds of the business is better done in a private room," this Committee hesitate to recommend the universal adoption of public sittings, though their own opinion is in favour of making public sittings the rule, and private the exception.

New and more conveniently arranged Courts for the Masters, under the same roof with the Courts of the superior Judges, seem to us an almost indispensable requisite for the complete attainment of a good system of conducting business before the Masters.

It will perhaps be objected to this plan that there are cases, where at the original hearing an alternative of decision may be open to the Judge, dependent upon the result of proceedings before the Master; and that on the proposed system the Judge would be required to decide upon both alternatives, though ultimately his decision upon one only would be required.

This Committee think, however, that the increased labour to the Judge in a few cases, ought not to be put into comparison with the advantage to the suitor, in by far the greater number, of being saved the necessity of a second useless application to the Court.

Again, it may be urged that the facts as they appear at

¹ A Solicitor's Observations, &c., p. 36.

the hearing, may not enable the Judge to make any decision. The reply is, then the bill ought either to be dismissed or to stand over till clearer evidence is adduced; or, if the Court should think it desirable to send the cause before the Master, the reference should be made in such terms as would leave the question to be decided by the Master in the first instance, and to come before the superior Court only on appeal.

Some apprehension will probably at first be entertained, that a difficulty may be found in so framing decrees as to distinguish the province assigned to the Master from that of the Court. But this Committee does not think that such will be the case. There appear to them to be two classes of cases only, in which any difficulty in this respect could arise:—1st. Where the Court becomes aware in the course of the argument before it, of some matter so involved in obscurity that no decision upon it is possible, but yet of such a nature that it does not think fit either to make a decree without taking it into consideration, or to dismiss the Bill:—2dly. Where the relief to be administered for enforcing the rights of the parties calls for the exercise of judicial discretion, while the facts by which that discretion is to be guided are still unknown.

An illustration of the first class of cases may be supplied by a case of *Hennington v. Houghton*, reported in Young and Collier¹, where the Court, after deciding that an account would lie between landlord and tenant upon a husbandry lease, directed an inquiry as to the circumstances connected with an assignment to the sheriff, because “it was satisfied that it did not know the whole case.” The second class may be exemplified by the case of *Longmore v. Elcum*, contained in the same Reports², where there was a question, whether or not the widow of a testator had under his will any discretion in the application of a trust fund among his children; and the Court, after intimating an opinion that she had such a discretion, directed numerous inquiries into the circumstances connected with the property and the application of its proceeds, with the view, apparently, of obtaining all the in-

¹ Chancery Cases, vol. ii. 630.

² Ib. p. 263.

formation necessary to guide it in coming ultimately to a conclusion how far it would interfere with the exercise of that discretion.

Now, if the changes recommended were introduced, these decrees might have been in substance as follows:—

In the first case:—Declare that A. B. is entitled to an account against C. D., &c. Let the Master take the accounts, and let him inquire into the circumstances under which the assignment to the sheriff was made, and determine whether the rights of the parties are in any and what manner affected by it. In the second case,—Declare that the widow of the testator has a discretion in the application of the proceeds of the trust property, and let the Master determine whether under the circumstances of the case the Court should in any and what manner regulate the exercise of that discretion.

The alterations proposed, it may be observed, bear considerable analogy to the practice now customary in charity suits, where the Court habitually declares at the hearing whether or not the property is affected by a charitable trust, and refers it to the Master to settle a scheme for its application to the purposes of the charity; a form of decree which in the recent case of *Costobadie v. Costobadie*¹, where precisely the same question arose as in *Longmore v. Elcum*, the Court adopted. We apprehend that it would be easy to reduce all references to the Master to a similar form, and that by a few general words the points referred for decision, might always be easily and clearly defined. It might, however, be left in the power of the superior Court to accompany any reference by the enumeration of particular inquiries which it considered desirable, as a guide to the Master. But whether this was or was not done, the parties should, we conceive, have a right of appeal in all cases to the higher Court upon the ground of a refusal by the Master to make any particular inquiry; an appeal analogous to a motion for a new trial on the ground of a mis-direction or exclusion of evidence by the Judge at common Law.

¹ 11 Jur. 345., V. C. Wigram.

Assuming, then, that there would not be any formidable difficulty in framing decrees in the form suggested, this Committee consider that very great advantage would arise from the practice, by its enabling the parties in all cases to determine for themselves, after obtaining a declaration of right upon the hearing, whether any further proceeding was necessary — a power of which they are now often deprived by this declaration being reserved till the hearing on further directions, as was indeed the case in the cause of *Longmore and Elcum*, in respect to the degree of authority possessed by the testator's widow. To how considerable an extent this peaceable termination of causes is likely to prevail, may be inferred from the number of cases in which, under the present system, no decree is drawn up. From a comparison of the returns made in 1836¹, with those made in 1811², and the statements in the Appendix to the Chancery Commissioners' Report³, it appears that while in the years 1822, 1823, and 1824, 1561 original causes and about 520 causes on further directions, were heard and disposed of by the Court, there were drawn up during the two former years and three quarters of the latter only 1205 decrees; that is to say, in nearly one-third of the causes disposed of, the judgment put an end to the suit without a decree.

If, however, the conduct of inquiries at Chambers were committed to the Judge in the cause, this Committee does not see that any greater security for the attainment of the result last noticed would be attained than is supplied by the present system. Why should not the Judge, under it, be disposed to spare himself the labour of deciding the rights of the parties until all the facts necessary to a final decision had come before him in inquiries conducted before himself, just as much as at present, when he has to learn those facts from the report of the Master?

That under the system proposed in this Report either the present Masters as a body, or those Members of the Bar who might be willing to resign its struggles for a salary of 2500*l*.

¹ P. P. vol. xliii. No. 370.

² Ib. 1810, 1811. No. 194.

³ Appendix to Chancery Commission, p. 1149.

a-year and the authority of a judicial office, would be found incompetent to transact the business brought before them, this Committee cannot suppose. In fact, even at present, if the proportion of appeals from the Masters is compared with that from the Vice-Chancellors and Masters of the Rolls as deduced from the returns made in 1836¹, the result is in favour of the Masters; for, while the former appeals were, as has been shown, 176 in 4758 cases, or 3·72 per cent., the latter were, between the years 1818 and 1835,—from the Rolls, 319 appeals out of 6314 decisions, or 5·32 per cent.; and from the Vice-Chancellor, 483 appeals out of 6820 decisions, or 7·18 per cent.; or taking both together, 6·09 per cent.

Even in the case of reports upon the insufficiency of answers, which are all contested cases, it appears by one of the returns made to the Chancery Commission², that 192 decisions produced only 29 sets of exceptions, *i. e.* 15·15 per cent. of appeals; while, from the Vice-Chancellor, between the years 1828 and 1832, including all cases, contested and others, there were 209 appeals to 1798 decisions, or 11·62 per cent.³

But it appears to this Committee that the plan of increasing the powers of the Masters has further a great advantage over that of committing the business now transacted by them to the superior Judges, in the facility which it would afford for rewarding ability in the conduct of that business, by making the Masters' Courts a recognised, though not exclusive, road to the bench of the superior Courts. Without in the slightest degree imputing either to the present or any future Judges of the Courts of Equity an insensibility to the nobler motives which lead to the faithful discharge of judicial duties, this Committee still think that a Judge whose only means of distinction would be the way in which he conducted Chamber business, but who by displaying ability in the conduct of that might reasonably look forward to promotion, would be more likely to conduct that business well, than one who, with but slight prospect of any

¹ P. P. vol. xliii. No. 370.

² Appendix, p. 1154.

³ P. P. vol. xliii. No. 370.

promotion, would probably gain little increase of reputation by attending to his work at Chambers, and lose little by neglecting it.

It also seems not undeserving of attention, that it must be easier to secure a certain number of good Judges for the superior Courts, and a certain number for the inferior, than to find the combined number of Judges at once *equal* to the duties of the higher situation, and *willing* to attend to those of the lower. The greater the number of Judges required for Chamber business, the stronger does this argument become.

The desirableness of thus opening before the Masters the road to the Bench of the superior Courts, is a powerful reason against one proposal, which, otherwise, has something to recommend it; that, namely, of appointing one of the Masters for his knowledge of conveyancing, to whom all questions of title might be referred.

The same reason, as well as the difficulty of separating questions of account from other questions in a cause, operates against the plan of appointing particular Masters to take accounts, though we think it desirable that they should all have the power of calling in professional accountants in cases of peculiar difficulty.

If the Masters were raised into Judges, as proposed in this Report, a considerable saving in the time of the superior Courts would probably be effected, by the removal from them of a mass of causes, or matters arising in causes, which would at once be disposed of by the Masters. Some advance would thus be made, without any addition to the present judicial strength of those Courts, towards the means of forming a Court of Appeal out of two of the subordinate Judges with the Lord Chancellor, or three in his absence; a Court, the formation of which would probably conduce much to prevent appeals, though the right of further appeal to the Lords might be retained to preserve uniformity of decision. The appointment of a permanent Chief Judge in Equity would, we conceive, be a valuable addition to such a court.

Lastly, upon the plan of treating the Masters as subordinate Judges, there would be little difficulty in providing for a possible increase of business, either by increasing the

number of Masters in London, or by appointing local Masters, as there are local Bankrupt Commissioners; a plan which might also afford facility for the *viva voce* examination of witnesses. Greater difficulty would probably be experienced in providing for such an increase of business by increasing the number of Judges.

That a considerable increase of business may reasonably be expected to attend any great diminution of the delay and expense of Chancery proceedings, seems to result from the consideration of the number of suits at present compromised, without coming before the Court at all; as well as from the small increase in the number of Bills filed in the Court, when compared with the increase of the wealth and population of the country. Out of ninety-six causes in Mr. Field's office, which he mentions as disposed of in the years 1838 and 1839, fifty were compromised, dropped, or dismissed by the plaintiff, and of these the dates make it probable that forty-five had not come before the Court at all.¹

The returns made in 1836 give a similar result.² The causes heard during a long series of years bear a ratio of about one-third only to the Bills filed. Between 1818 and 1835, 12,816 causes were heard, and 39,686 Bills filed, from which, however, according to the ratio given by the returns of 1811³, about one-ninth, or 4500, should be deducted as Bills of Supplement and Revivor.

Again, it is a startling fact, that the number of original Bills filed in the Court, which between 1745 and 1749 was 9302, gradually declined during the next fifty years so much that from 1800 to 1804 it amounted only to 6378. From that time, indeed, it increased; and between 1818 and 1822 reached the highest point it had gained prior to 1836; the number of Bills filed in those years being 11,225; or, after deducting one-ninth for Bills of Supplement and Revivor, nearly 10,000. But between 1828 and 1832 the number had again decreased, amounting to 10,781, or, making the

¹ A Solicitor's Observations, &c., p. 85.

² P. P. vol. xliii. No. 370.

³ P. P. 1811., No. 244.

same deduction as before, to 9600 original Bills; that is, only 200 more than those filed between 1745 and 1749.¹

Yet, in the mean time, the business of the Court, in the causes which were before it, had greatly increased.

The Stock standing in the name of the Accountant-General, which, in 1750, was 1,665,160*l.* 18*s.* 4*d.* only, belonging to 1094 accounts, in 1825 amounted to 39,174,722*l.* 8*s.* 7*d.*, belonging to 8460 accounts.²

The Petitions presented, which between 1745 and 1749 were only 2151, between 1806 and 1810 were 5977. The Motions made in the first of the above periods, were 20,484; in the last 34,580.³

The explanation of these facts seems pretty clear; the cost of proceedings in the Court drives the greater number of suitors from its doors. They are closed against a very large body of persons who would gladly seek its assistance but for apprehension of the consequences. Surely then, if the expense and delay of these proceedings could be materially diminished, there is reason to anticipate a large increase in the number of suitors.

In conclusion, this Committee wish to say a few words on the relation of their present and past Reports to the general question of Chancery Reform. They are unwilling to have it supposed that, because their attention has been hitherto confined to considering the best constitution of a tribunal for conducting the business now done at Chambers, therefore in their opinion no other part of the procedure of the Court of Chancery requires, or is susceptible of amendment. It is indeed true that the last twenty years have witnessed many improvements in matters connected with the practice of the Court of Chancery. Since the Chancery Commissioners made their Report, we have seen the introduction of beneficial reforms in the mode of proceeding in Bankruptcy, in

¹ P. P. vol. xliii. No. 370. 1836. The returns made in 1845 show a tendency to increase; the average number of bills filed in 1840, 1841, and 1842, was 2517; which would give 11,287 original bills in five years.—P. P. vol. xxxviii. No. 67.

² P. P. 1810, 1811. No. 194.

³ Chancery Commission, Appendix, vol. ii. p. 630. It now exceeds 50,000,000*l.*

the taxation of Costs, and in Lunacy, — provision made for the more speedy hearing of Causes — the substitution of Salaries for Fees — and a variety of changes, too numerous to be specified here, in the forms of pleading and practice. Yet there remain many points in which, in our opinion, amendment is still required. In the practice of the Court as to parties; in its refusal to decide one or more points only in a cause without making a complete decree; in its mode of taking evidence; in many details of its general procedure, as well as of that adopted in its Offices, not excluding the Masters' Offices, there is much which this Committee considers as calling for serious inquiry. But the subjects embraced in their present and two preceding Reports yield to none in importance; and even if they were not limited by the terms of the references made to them, this Committee are of opinion that to no part of the wide field of Chancery Reform could their attention be more usefully directed, in the first instance, than to the general constitution of the Masters' Offices, and the mode of conducting business there.

COMMITTEE ON CRIMINAL LAW.

The following reference was made to this Committee: —

To consider whether unaggravated larcenies of small amount might not be advantageously submitted to the jurisdiction of the Petty Sessions.

REPORT.

This Committee are of opinion that much evil accrues from the confinement of offenders, charged with very trifling larcenies, for a longer or shorter period previous to their trials at the Assizes or the Quarter Sessions.

That the provisions of 7 & 8 Geo. 4. c. 29. s. 30., and those of 9 Geo. 4. c. 31., in similar and analogous cases, have been found to work well, and might be advantageously extended, with some modifications, to trifling common law larcenies.

That such cases do not often involve much difficulty as to the law, nor much doubt in the investigation of facts.

That it would be desirable, therefore, that these should be disposed of summarily at the District Petty Sessions; that the Petty Sessions should be constituted a Court of Record; and that the times and places of holding it should be settled by the magistrates assembled at the Quarter Sessions, subject to the approbation of the Home Secretary.

That the offences to be tried at such Petty Sessions be confined to charges of simple larceny of a small and limited amount; that the punishment be also limited; and that a conviction at the Petty Sessions be not followed by any of the legal penal consequences of a conviction for felony.

That the person charged be at liberty to claim having his case remitted to be tried by a jury in the ordinary course; and that the Court of Petty Sessions be likewise empowered to send the same for trial, if they shall think fit, to the Assizes or the Quarter Sessions.

[The following act was, to a certain extent, the result of this Report. It will be seen, however, that its operation is limited to *juvenile* offenders, whereas the Report has no such limitation. It will also be seen that it was proposed to give the person charged the *option* of a jury. The clause to this effect was struck out in the Commons, but restored on a conference. This act gives another blow to trial by jury, even in criminal cases. Under the County Courts Act, this mode of trial is nearly superseded in civil suits for demands under 20*l*. In one of the metropolitan courts there have been 3000 cases tried, in which applications for juries have been made in only *three* cases. — ED.]

10 & 11 *Vict.* c. 82. *An Act for the more speedy trial and punishment of juvenile offenders.* (22 July 1847.)

“Whereas, in order in certain cases to ensure the more speedy trial of juvenile offenders, and to avoid the evils of their long imprisonment previously to trial, it is expedient to allow of such offenders being proceeded against in a more summary manner than is now by law provided, and to give further power to bail them: be it enacted by the Queen’s most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the au-

thority of the same, That every person who shall, subsequently to the passing of this act, be charged with having committed or having attempted to commit, or with having been an aider, abettor, counsellor, or procurer in the commission of any offence which now is or hereafter shall or may be by law deemed or declared to be simple larceny, or punishable as simple larceny, and whose age at the period of the commission or attempted commission of such offence shall not, in the opinion of the justices before whom he or she shall be brought or appear as herein-after mentioned, exceed the age of fourteen years, shall, upon conviction thereof, upon his own confession or upon proof, before any two or more justices of the peace for any county, riding, division, borough, liberty, or place in petty sessions assembled, at the usual place, and in open court, be committed to the common gaol or House of Correction within the jurisdiction of such justices, there to be imprisoned, with or without hard labour, for any term not exceeding three calendar months, or, in the discretion of such justices, shall forfeit and pay such sum, not exceeding three pounds, as the said justices shall adjudge, or, if a male, shall be once privately whipped, either instead of or in addition to such imprisonment, or imprisonment with hard labour; and the said justices shall from time to time appoint some fit and proper person, being a constable, to inflict the said punishment of whipping when so ordered to be inflicted out of prison: Provided always, that if such justices upon the hearing of any such case shall deem the offence not to be proved, or that it is not expedient to inflict any punishment, they shall dismiss the party charged, on finding surety or sureties for his future good behaviour, or without such sureties, and then make out and deliver to the party charged a certificate under the hands of such justices stating the fact of such dismissal, and such certificate shall and may be in the form or to the effect set forth in the schedule hereto annexed in that behalf; provided also, that if such justices shall be of opinion, before the person charged shall have made his or her defence, that the charge is from any circumstance a fit subject for prosecution by indictment, or if the person charged shall, upon being called upon to answer the charge, object to the case being summarily disposed of under the provisions of this act, such justices shall, instead of summarily adjudicating thereupon, deal with the case in all respects as if this act had not been passed.

“2. And be it enacted, That any two or more justices of the peace for any county, riding, division, borough, liberty, or place

in petty sessions assembled, and in open court, before whom any such person as aforesaid charged with any offence made punishable under this act shall be brought or appear, are hereby authorized to hear and determine the case under the provisions of this act : Provided always, that any magistrate of the police courts of the metropolis sitting at any such police court, and any stipendiary magistrate sitting in open court, having by law the power to do acts usually required to be done by two or more justices of the peace, shall and may within their respective jurisdictions hear and determine every charge under this act, and exercise all the powers herein contained, in like manner and as fully and effectually as two or more justices of the peace in petty sessions assembled as aforesaid can or may do by virtue of the provisions in this act contained.

“3. And be it enacted, That every person who shall have obtained such certificate of dismissal as aforesaid, and every person who shall have been convicted under the authority of this act, shall be released from all further or other proceedings for the same cause.”

[The remaining sections need not be here given.]

ART. V. — LEGAL EDUCATION.

Report from the Select Committee on Legal Education, with the Minutes of Evidence. 1846.

NAPOLEON said that he only was the great general who, after having gained a great victory on Monday, was ready to win a second on Tuesday. The necessity for legal education having been now admitted by the Inns of Court, we have to see how this great moral victory may be improved. The last person usually convinced of the necessity of a change is the person who is to carry it into execution, and thus it has been with the respectable authorities we have just mentioned. We do not think it impossible that, although they were slow in conceiving the idea that lectureships must be established, and slow in acting on it, yet still slower will they be in taking those other steps without which the

lectureship will become, we are satisfied, a failure. After the first novelty has passed away, lectures, if unaccompanied by other changes, will cease to be attended, unless they bear on some immediate topic of interest; and we need not go far for proof and illustration of this.

Before alluding to the necessary accompaniments of lectures, we think we shall be rendering good service to the English reader, if we translate some observations of M. Rossi, which are as applicable to English as to French legal society. Our readers have already had before them nearly all that we can say on this subject.

M. Rossi is one of the most sound and philosophical jurists of France, and his views are contained in a Memoir of which the title is prefixed¹, and which was given to the public during the reign, and (when contrasted with that of his immediate successor) comparatively wise government, of Louis XVIII.

"It is perhaps useless to prove that in a great number of countries the teaching of the law requires amelioration: so long as we confine ourselves to this assertion, nobody will venture to dispute it. But the object is not solely to establish new chairs, to grant encouragement to the study of private law (too much neglected in consequence of the mode, and the superior attraction, of political discussions), or to render more severe the discipline of the schools where it appears to have become relaxed. These means, useful and worthy of eulogy in themselves, are not sufficient for the attainment of the end at which it is proper to aim.

"We are at a critical epoch for whatever concerns public and private law. Here, recent institutions require to be confirmed by legal means; there, the new productions must be put in accordance with the parts which are preserved of the ancient social order; in fine, the country is in such a state, that it is absolutely necessary to prepare the means requisite for effecting an enlightened and well-regulated accomplishment of changes now become indispensable; and

¹ "De l'E'tude de Droit dans ses Rapports avec la Civilisation et l'E'tat actuel de la Science." M. Rossi is now, or was very recently, French ambassador to the Pope, where, of course, he had to carry out the instructions of his government.

that, under the penalty of seeing the work of wisdom undertaken all at once and spoiled by folly, and the treasures of liberty wasted by licentiousness.

“It is to the youth of the nation, it is to the new-arising generation, that it will belong to accomplish this great task. Few men, among those who at present figure on the stage of the world, appear to me in a condition to contribute efficaciously to the establishment and confirmation of the legislative system called for by the moral and political state of Europe.

“I speak not of those men for whom our social crisis has commenced without their having ever suspected its approach. There are beings who, immured in a profound sleep, have been transplanted all at once into another universe : what would they be able to effect in this unknown region? Their wants, their language, their ideas, their sentiments, are not those of the inhabitants of the country in which they are forced to drag on their existence. Provided their aversion does not go so far as to require the abandonment of all the principles, and the absolute sacrifice of the general welfare, we must bear with patience their bad humour, and not pretend that they themselves co-operate in a work of which they can neither feel the necessity, nor comprehend the advantages.

“But, even among the men who have opened their eyes to the new social dawn, there is a great number from whom nothing is to be expected for the work of legislative reform. Some still vacillate between the region of darkness and that of light. A vague desire to advance towards the latter sometimes animates them; but their strength is far from being adequate to the effort; the weight of long years of prejudice oppresses them. Assailed in succession by a vague sentiment of what is good, by their self-love, and by the consciousness of their own powerlessness, they end by deciding that the feeble and uncertain glimmer of the twilight is the true illumination which ought to guide the steps of the sage.

“Others, more under the influence of their passions than enlightened, more irritated against oppression than instructed in the legal means of repressing it, scarcely see the new social career opened than they rush into it like madmen.

Not perceiving distinctly the end to be aimed at, they abandon themselves to the most dangerous extravagances.

“The persons just alluded to, however, have excited an alarm, of which the influence has not been transient. We find this influence in a great number of men, well-intentioned, sufficiently enlightened otherwise, but who having become timid unto pusillanimity, dare no longer to undertake what is good from a dread of arriving at what is evil. The audacity and the blind intolerance of the innovators have given them the unfortunate habit of viewing reforms only as a pretext for disorganisation and disorder. Timorous from the delicacy of their constitution, respectable from the purity of their intentions, it is necessary to allay the apprehensions of such men, to rouse moderately their courage, and not to irritate their self-love by a misplaced disdain.

“When, impatient of the precautions and distrust of the persons last alluded to, bolder men have chosen to brave them, the latter have thereby merely transformed them into declared enemies of the new order of things. It has often been repeated, and with reason, that we must be on our guard against friends too ardent, and animated with an inconsiderate zeal. Rome had not to congratulate herself upon the extravagant zeal of the Gracchi. How often one is tempted to repeat these words of Montesquieu: — ‘Ce qui me choque de ces beaux esprits, c’est qu’ils ne se rendent pas utiles à leur patrie.’

“There exists, however, a small number of men who, notwithstanding their defective education, and the prejudices of their youth, or of their caste, have, if I may use the term, divined the theories of sound policy and the wants of our age, and have never deviated from that line in which liberty is found united with security and respect for existing rights, with that which is due to the rights which are still to be established. Men truly privileged. A lively sentiment of what is just, noble, and generous has placed them at the outset upon the right path, and they have freely pursued it across dangers of every kind, and in spite of the obstacles which ignorance, wickedness, and fanaticism opposed to them. Unfortunately, the number of such men is limited; unfortun-

nately, their voice is often without effect; they do not make enough of noise to induce the multitude to follow them, and acknowledge that they are the only persons who plead their cause in good faith. The government, whose false steps they might prevent, whose prejudices they might dissipate, and establish by evidence their true interests, act towards them like the sick patient who allows himself to be brought to the verge of the grave by the family physician, and only at this last extremity decides upon consulting the more skilful. Should this aid arrive in time to ward off the last blow of presumptuous ignorance, the person who really saved the life is soon forgotten; the person usually employed in the family soon then resumes his former powers; his audacity, his pretensions are the same; and he exercises anew his absolute authority over a weak and credulous mind.

“ It is only by imparting knowledge, and enlightening the rising generation, we are convinced, that the desired end can be attained. Now, for that purpose, the present youth must have the means of acquiring such knowledge.

“ But is not that a truth dangerous to be told? Is it not to point out to the enemies of the new order of things the steps which they have to take to prevent its progress? And will they not conclude from this, that they must shut from the eyes of the young generation the sources of instruction, and render them incapable of contributing to the development of the new social system? I do not believe that any government would be perverse enough to make such a frightful calculation. But if it wished to found its duration upon ignorance, it would be necessary to prove to it how deceitful that measure is, not only by the calamities which it prepares, but still more because it would act in a manner directly the opposite of what might be expected from it.

“ It has often been repeated that nothing can arrest the new political and moral development of Europe. This proposition appears to us quite evident; for the causes of this great effect are no longer within the power of men. When crusades have been preached, printing invented, the new world discovered, commerce and industry extended in every way, gunpowder compounded, the infantry of armies aug-

mented and raised in public opinion, burghers and commoners employed against feudal vassals, a struggle maintained against the encroachments of ecclesiastical power, the strength of the people invoked against the despotism of a foreign power; the human race has been told — rise, learn to march forward — thou art not in the proper place. And when one hears persons professing the Protestant worship, governments protectors of that worship, astonished that the men of the present day are reasoners, indocile to the voice of authority—that they wish to think, to examine, and to see clearly into their affairs—would not one believe he heard a surgeon who, though quite convinced of his having performed the operation of the cataract upon his patient, should testify his surprise that his patient makes use of the faculty of seeing?

“At the same time, it is true that the men who have contributed to the wants the most favourable to the cause of humanity, have not foreseen all the consequences of the acts, which appeared to them so useful and so fair with reference to their own peculiar interest. Assuredly it was without suspecting it, that Peter the Hermit and Godfrey, Ferdinand and Isabella, Charles V. and Philip II., Louis XI. and Richelieu rendered to the cause of man signal services.

“Whatever may be the nature of the new sentiments of a nation, the impartial and the enlightened observer will always find in them sufficient principles of order and of justice, to form of them the basis of his social organisation. We must leave to declaimers and to political egotists those stupid diatribes in which they vent their malice and hatred against a whole people: their least fault is the proclamation of error.

“In placing ourselves on the territory of the nation, we shall find there more moral force than is generally believed; for it is in the nature of man to love social order, and to attach himself to whatever preserves and embellishes it. This moral force will be proportionate to wants. Wherever it exists, if it is not infinite, it is at least immense; so far as we have merely regiments and bayonets at our command, we are weak; our adversaries can always count them; while they cannot estimate the moral forces, those invisible, but palpably sensible forces, when they form the vanguard and the rearguard of

an army. It was by the moral forces of Hungary, that Maria Theresa preserved to her son the imperial throne. The English Government has often used and abused the moral forces of England, without being able to exhaust them: they were not derived from without, they were placed in the heart of the nation.

“Now, one of the most efficacious means for creating and properly directing the moral forces of a people, is assuredly to instruct the rising generation in the science of law, whether public or private, that is to say, in the doctrines which have the most direct tendency to the preservation of social order, and to the development of national feelings and sentiments. Left to itself, the youth of the nation will necessarily take part in the latter; they will, perhaps, deal heavy blows at the former. Let us be convinced the problem is reduced to knowing, whether we shall, one day, have members of the community, such as Publicola, or such as the Gracchi.

“If the youth of the nation, in the great social questions, finds itself reduced for instruction to the political brochures of the day, to works produced by circumstances; if called upon to found a great system, and to co-operate in the accomplishment of Legislative Reform, the youth of the nation has not been habituated to raise itself to the height of principles; if acquainted merely with matters of routine in the school and liberal in the ‘salons,’ hampered and constrained by the fetters of a bad education, and impelled at the same time by the movement of the age and the vivacity of youth, the rising generation feel the necessity of acting well, and yet know not the means of doing so: finally, if always fluctuating between its wishes and its ignorance, the youth of the nation abandons itself to those political excesses which often assume the semblance of fair and good actions, who would be the truly culpable? Who would be those who ought to be dragged before the tribunal of inexorable posterity?

“Doubtless, it would be absurd to reproach our grandfathers for not having prepared us for the new order of things. The contemporaries of Montesquieu could not themselves penetrate the veil which concealed from their view the period which

was to follow. But for us, we have no excuse to authorise our inertness and indolence. The irresistible march of affairs and of minds is no more a mystery. I am not one of those who believe that we have the means of doing every thing, and that we ought to leave to our grandchildren merely the pleasure of gathering the fruits of our institutions. I do not believe in miracles in matters of legislation and politics. I do not prefer the work that is incomplete and not firmly established from precipitation, to the solid work of experience and of time. In fine, I am convinced, that upon a great number of questions, political and legislative, even upon those which appear to have been the best discussed, there still remain many curtains to be raised. But it is at least certain that we are, upon many of these subjects, more advanced than our fathers were; more advanced in relation to science, infinitely more advanced in relation to general sentiment and the new moral wants, which manifest themselves in Europe.

“ Now, if we cannot conduct the youth of the nation beyond the point where we now find ourselves, it is, at least, I shall not say useful and generous, but obligatory upon us, to put it within the reach of appreciating the present state of civilisation. For this state, which, seen as a whole, is no longer unknown except to the imbecile and fatuous, of all ranks and conditions, could not escape the piercing eyes and the investigating spirit of youth. But why do I say escape? The youth of the nation feel it in themselves; they are themselves an element of it. They are born in this new atmosphere; they have breathed the new air. The youth, in general, cannot be but in harmony with their age: were it otherwise, this age would not be what it is; there would have been in the moral world action and inaction at the same time—something more than a miracle. In thwarting, by a bad education, the natural course of their thoughts, they may be rendered incapable of founding a good system; but they are not thereby attached to old systems, which have no attraction, hold, or influence over them.

“ But, it will be said what, do you ask, should be taught under the name of public law, internal or external? In order to satisfy your desires, must the youth of the nation be ini-

tiated in those doctrines, of which the dangerous maxims are in the mouth of all the revolutionists, the enemies of every thing that is? Even in the schools, must there be mention made of constitutional law, of political economy, of English judicial procedure, of national independence, of the duty of the strong towards the weak, of the interest which the former have in defending the latter; finally, of all those theories put forward by the innovators? Must there be established chairs or professorships of innovation, of insubordination, and of disorder? This sophism would deserve to be refuted with indulgence, if it did not serve and was not employed as a warlike instrument for bad faith, as well as an excuse for timidity and weakness.

“Those declarations of the Rights of Man, the one more absurd than the other, which were fabricated in France and in America, was it in the schools of law that these were learned? Was it from a professor that Jean Jaques Rousseau learned the extravagant principles which disfigure his *Contrat Social*, and his discourse upon the inequality of conditions? Does the want of chairs for the new theories arrest the march of ideas? Is there a single studious young man, who, unless he be completely foolish or imbecile, or egotistical and presumptuous, or self-conceited to a degree revolting and disgusting at that age, has remained a stranger to them?

“What will happen, if the teaching of public and private law be not placed in harmony with existing circumstances? Precisely what would happen if, because there are poisonous plants, the teaching of botany were prohibited. The young people would go to botanise by themselves, all alone; and they would probably end in poisoning themselves and others.

“There is abundance of professors of mathematics: yet when I see a young man studying, without a guide, a work of calculation, I feel no painful apprehension regarding him. Does he dream of the quadrature of the circle and of the trisection of the angle, he would not in that way upset the world. But, when I see him devouring the *Contrat Social*, however much I may admire the genius of Rousseau, I tremble for this young man and for his contemporaries. Perhaps I say to myself, is he going to persuade himself, not

only that all sovereignty emanates from the people, but that it is not transmissible? The consequences of this error are easily deduced: soon he will be convinced that, without injustice, nothing else can be made of the entire world than one vast democracy. Now, how to bring back this young man? Will it be by talking to him of the Divine right, of the rights of family, of long possession, of the respectful acquiescence of many generations in such or such an order of things? This would be to wish or attempt to convert an atheist, by laying down the authority of the Gospel as the fundamental basis of reasoning. Either I deceive myself much, or the only antidote to the poison will be found in a good course of internal public law, in which, laying aside all that is no longer of our time, there shall be given the true theory of the representative system, its foundations and consequences developed, and its immense advantages demonstrated. It is then, that, while learning to appreciate his rights as a citizen, the young man will learn, at the same time, to revere his prince, and to honour those who have deserved to be placed in the first ranks of social order. He will learn to respect the people without flattering it, and to seek to promote the welfare of the nation, by regulating his conduct, not by popular clamour, but by the inspirations of the enlightened conscience of an honourable man. And, if, in finishing his studies, he finds himself nourished and instructed in sound doctrines,—if, in entering into the world, he is not in the condition of blushing for what he has learned at school, he will not stagger or prove unsteady in his moral and political conduct. It is the same with errors as with crimes: the best plan is to prevent them.

“Let us frankly and nobly profit by the youth, that great element of social life. It is revolting to hate it; it is ridiculous to dread it; it is senseless to despise it. We shall scarcely have had the time to dispute for our pretensions and our prejudices, when the young generation will be already mistress of the destinies of the world. So short is life!

“Less alarm is excited, when it is simply proposed to ameliorate the plan of instruction in private law. But what obstacles, also, are not encountered on the part of ignorance,

carelessness, and routine? I speak not solely of the countries where it is still believed they have attained the highest degree of perfection, in prescribing to the professors of the civil law to make comments upon Heineccius, and to the professors of penal or criminal law to follow, step by step, the treatise of Matthæus. In the countries which have established a new legislation, the prejudice of contempt or disdain often adds itself to all these other obstacles. We have made codes, it is said: can law be studied better than it is studied with us? Do not there appear, incessantly, new commentaries upon our laws? People, then, are zealously occupied with them. Nevertheless, they are still groping in the dark in search of an arrangement suitable to the schools of law; they make and unmake every day; the public and the private law are contrasts to each other in a most shocking manner: one would say, there are two systems of law, made for different countries, quite astonished to find themselves together: jurisprudence far from developing itself in an uniform manner, and striking its roots deep in the midst of the nation. The works upon the new civil legislative codes are almost every where merely collections of comments, inferior to those of the school of Irnerius; for there are in them neither the same vigour of youth nor the same spirit of originality, as there are not the same reasons of excuse, derived from circumstances and time, for the errors which we meet with in them. Finally, in almost all Europe, says an author, the laws are supported only artificially; they do not exercise an empire of or through themselves: we are obliged to supply their want of power by violent means, and it is sometimes only by force of arms that we are able to cause them to be observed.

“As for the rest, if the necessity of ameliorating and re-animating the study of private law, is not demonstrated by the picture of the state of that science, such as we have presented in the first part of this memoir, whatever we could add here would be useless. We have shown that the juriconsults are divided into different sects; that the ancient system of law is every where more or less profoundly undermined and in decay, and that there exists between the ancient and the new system, as between the different new opinions,

that same contrast, which has signalised, and still signalises, the great social reforms. We showed, at the same time, that the decay of law was owing to its having lost for a long time all national character, and to its having been entirely abandoned to erudition without philosophy, to routine practice, and to the irregular action of absolute governments.

"What is essentially wanting, is a national jurisprudence. It is a national jurisprudence that we must exert ourselves to revive; it is towards a national jurisprudence that the efforts tend of even all those who are not in a condition to give a distinct account of their wishes.

"By national jurisprudence we here understand, neither new compilations, nor legislative codes invented *à priori*. We understand a system of native or indigenous law, which is the faithful expression of the national wants, which is formed by little and little, which lives in the consciousness of the citizens, avails itself of and derives aid from all their feelings and sentiments, and is never in a state of hostility with them. It is not proposed to abolish precipitately, laws, whether Roman, Gallic or German, and to re-construct all anew. That part of the Roman law to which might be restored all its moral activity would, perhaps, be more national at the present time than a great number of modern inventions. Now, is it to the old practitioners, or to the practitioners who wish a change, the only persons who share between them, in the greatest number of countries, the domain of legislation, that we shall be able to trust, in order to create a national jurisprudence?

"We shall arrive at this great result, only so far as we shall take care to prepare the youth of the nation for it, by studies adapted to existing circumstances. The moral action of our age, abandoned to itself, in the midst of so many obstacles and fetters, may lead, for private law, to results troublesome or imperfect; as political effervescence may lead to disastrous troubles."

There is much sound sense and true philosophy in these remarks of M. ROSSI; and in the main we agree with him in thinking, that the only safe and proper course for the nation is, to diffuse education; and we believe that legal education is

as necessary to the rising generation of lawyers, as general education is to the masses.

With the view, then, of assisting the efforts that are now being made to establish a practical system of legal education in this country, we shall turn to some points in the evidence before the Legal Education Committee, to whose report we have already had occasion to refer.

First. Let us give some of the opinions which relate to the further extension of the plan proposed by the Inns of Court, by instituting examinations previous to a call to the bar, and by rendering the attendance at lectures compulsory. It will be seen that some of the witnesses consider the examination more important even than the lectures.

50. "Was power given to those societies to institute any course of education which they thought proper?"—MR. STARKIE. "I am not aware that there was; at the time of the grants to the houses they had their own course of discipline, I think; and it was not interfered with in any way that I am aware of."

51. "They had ample power to establish any course of education which they might think necessary for the advancement of the profession, and for the increase of legal knowledge in the country?"—"I presume that they might have altered their course if they had thought it required improvement, but they had a regular settled course, which seems to have been a good one. There were readings, and there were those mootings, both of which I apprehend to be very proper modes of inculcating legal knowledge."

52. "And examinations?"—"I think they had examinations; I think the reader had power to examine."

53. "Were certificates of having passed through those various courses of study and disputation requisite as a qualification for admission to the bar?"—"Yes; I do not exactly know what the course was, but there was a recommendation to the bar, and I believe that is the foundation now, at least one foundation, upon which the judges sometimes interfere with calls to the bar; I believe that is the connecting link, that, inasmuch as the judges receive from the Inns of Court those who are called to the bar, they exercise a jurisdiction with respect to the calls."

57. "Do you think it would be a course authorised, either by precedents or by existing powers, to declare that they would not admit to the bar any student who had not gone through a course of preliminary education in one of those Inns?"—"I think that the

power of calling to the bar is, to a certain extent, discretionary; my own opinion is, that they might say, 'We do not conceive you to have a sufficient knowledge of law to warrant calling you to the bar.' Certainly that would be but according to ancient usage, because it is quite clear that the reader, who might call to the bar, was to do so if he found the party competent."

258. "Would you make attendance upon the lectures compulsory?" — Dr. PHILLIMORE. "I would not give a law degree without a sufficient knowledge of the science."

289. "In adopting a course of legal instruction, would you recommend examinations as necessary for admission to the bar?" — "That has also occurred to me, that there should be some examination, but I would not have it too strict."

293. "In addition to examination, would you require, as a condition of admission to the bar, attendance upon a certain number of lectures in those departments, especially to which the future barrister intended to devote himself?" — "Certainly."

366. "In reference to the improvement of legal education, would you recommend the establishment of courses of lectures and examinations fitted to communicate and ensure such knowledge to the different classes of gentlemen who might intend hereafter to devote themselves to those duties of which you have spoken?" — Mr. CREASY. "Yes; but I think it most important to institute an examination. I should be more disposed to leave open to the student the mode in which he might acquire the requisite amount of knowledge, but I should insist upon an examination which should show that he had that knowledge before he entered himself at one of the Inns of Court, and again before he was called to the bar. I think it would be desirable if lectures could be instituted, or any mode of study provided, but I do not think I would debar the student who had acquired the knowledge in another way from presenting himself in order to pass the examination; and if he passed it satisfactorily, from being permitted, in the first instance, to enter himself as a student of one of the Inns of Court; and, after he had completed his terms and passed another examination, I would give him the right to practise in our Courts."

418. "Would you think it right that the benchers should refuse admission to the bar to any candidate who had not passed through an examination similar to what you have stated?" — "Yes, I think so; as at present, any well-founded heavy objection against character ought, of course, to be fatal; but to pass an examination of this sort, I think, should be requisite before a man should be called to the bar; I think it right that there should be some guarantee of a

man's fitness for the profession, before he takes upon himself to practise it, and before he assumes that status in society which, to some extent, the title of barrister confers."

It will be seen that Mr. Empson fully supports the opinion that we have recently given, that the Inns of Court are bound to establish a complete system of legal education, in order to justify the monopoly that they now enjoy.

666. "I think, in the former part of your evidence, you stated that you thought it advisable that the Inns of Court should establish lectures, and also that the judges and the benchers should require a degree, as the qualification for admission to the bar?"—MR. EMPSON. "I am not a great bigot about lectures, though I have been lecturing so many years myself. If the books were well selected, reading guided by an examiner, who was to examine, might do as well. Reading, so superintended, would supply a good succedaneum for lectures. At the same time, lectures have great advantages, if you get a good teacher,—a man who gets any hold upon his class. The inns of court are bound to make a move of some sort. *In order to reconcile with common sense their monopoly of the practice of the law, they must show the public that they give us some equivalent—a guarantee for something.*"

667. "Would you allow the lecturers to take classes, as they do in the universities abroad, where there are three distinct departments of lecturers, the public, the private, and the most private; the most private being lectures given to the private class solely?"—"It must be supposed to be more advantageous, the more the professor is willing to give his time up for that purpose; each additional instruction leaves a fresh coat of paint."

668. "In order to carry this system out, would you prefer the Inns of Court to any other institution for such purpose?"—"I should prefer the Inns of Court; they seem to me to fall in the most naturally. The Inns of Court are on the spot; they were established originally with this object. Lord Coke called them a third university. *It is absurd for them to call themselves private bodies; they are public bodies, charged with a public trust of the highest concernment to society.* And whatever other question of jurisdiction may be supposed open, there is no doubt, I presume, but that in all that regards admission to the law, the benchers are the delegates of the judges. For example, if it were thought desirable to enforce a more systematic education, all that is needed is for the

benchers and judges to settle the system, and sanction it with their authority."

669. "Were an agreement to be effected between the different Inns of Court, to establish such a system, would you recommend that each Inn should have a special lectureship, or that they each should have exactly the same series and description of lectures for their students?"—"That must depend upon circumstances, as to the number of students in the Inn of Court, and the department of the profession they would choose. In case the legislature should find (which is most unlikely) that the Inns of Court were to refuse any necessary co-operation, *the legislature is bound to legislate through any claims that the Inns of Court might set up.*"

1375. "Would you, in order to meet that deficiency, recommend that the Inns of Court, for instance, should take up those more special branches of the profession; and establish professorships, with the view of affording an efficient education to barristers or attornies, and to pay them out of their own funds, retaining them under their own control?"—Mr. Amos. "I think the Inns of Court are useless vestiges of antiquity, without superintending legal education, and I think they should provide for instruction in the subdivided departments of law."

1376. "Do you see any material difficulty in carrying that purpose into execution?"—"No difficulty except that of moving great and powerful bodies, and reviving the spirit of institutions, after their forms have become a dead letter."

1377. "Are you aware that some efforts have already been made for that purpose?"—"I hear that they are giving lectures; but I should say that, if it is only lectures, the attendance on them will be very small; there will be only a few choice individuals. I have heard, also, that it is proposed to require certificates of the attendance upon two courses of lectures. This cannot easily be effected by one Inn of Court, unless the others concur. But I think that such certificates would only create an illusion that something was doing by the Inns of Court, and would be of very trifling benefit. Mere attendance upon law lectures, especially if it be compulsory, will only be a colourable improvement of legal education."

1378. "Besides lectures, you would recommend that in the Inns of Court there should be examinations?"—"Yes, and I would let the comparative proficiency of every individual be made public."

1379. "And that these examinations should bear on the particular courses therein established?"—"Yes."

1880. "Would you recommend that the admission to the Bar should be made dependent on the answering at those examinations?" — "I have doubts on this point; I may, perhaps, be allowed to observe, that a criterion of competency is far more essential for the admission of attorneys than of barristers. It may be sufficient, in the case of barristers, to promulgate a competent judgment on their proficiency in the matters on which lectures have been given, and the rather as many qualifications of a barrister cannot be tested in this way."

There is a good deal in the observation of Mr. Amos, that a delusion might be created if attendance on lectures were rendered compulsory by means of certificates. There might be apparently a large class, but after all a very small degree of attention. The lecturer should stand or fall by his own merits, and cannot be propped up in this manner by enforcing attendance.

Lord Brougham would, in the first place, give only honours.

1803. "It would be a very important honour for a party to gain: for it would not end in honour; it would end in profit. Therefore I think, without altering the law upon the subject, giving the Inns the power to make examinations or attendance compulsory, regulations might easily be framed to have the same effect, to induce almost all those whose legal education is of importance to attend."

It will be seen that nearly all these witnesses consider an examination would be advantageous, and, farther, that it would be competent for the Inns of Court to insist on it. It is proper, however, to observe that Lord Brougham differs in opinion as to this.

3801. "Is it proposed to have a public examination previously to admission to the Bar?" — "None of the Inns of Court have gone the length of saying that there must be a public examination to qualify. They consider that a very difficult and delicate matter, entering the Inns of Court, that the student should bind himself to submit to such examination." — "It might be made so; but all the subjects of the King have a right to enter at the Inns of Court, and that inchoate right would be interfered with. It would be just removing the difficulty a step farther, and bringing it on at an earlier stage. It would be preventing a person from becoming a member of any of the Inns of Court; and I have grave doubts

whether the Inns of Court have the power of imposing any such condition ; indeed I have very little doubt that they have not. It is to be observed, that an unfit person acquires no benefit from his call to the Bar ; he only becomes capable of practising, if he can obtain clients."

3803. "If it were not made compulsory, do you think it could be left to the option of the students?" — "I think a great deal might be done by giving marks of favour and approbation, or other honours, by the Inns of Court ; because the great bulk of those who would either attend in the hall to be called to the Bar, according to the present practice, or who would attend classes, or who would wish to be called to the Bar without attending classes, are men who wish to gain a livelihood by their profession, and nothing could tend more to present a man favourably to the profession, to solicitors, attornies, and clients, than to send him forth as having gained the approval of the Inn of Court."

Lord Campbell, however, is of opinion that the Inns of Court have the power to insist on an examination previous to a call to the Bar.

3828. "He (the student) is obliged to look for information as he can get it, without any means of having it pointed out to him?" — LORD CAMPBELL. "I believe that England is the only civilised country in the world where there is not a regular course of discipline required from those who are to practise the profession of an advocate, and to administer the law as judges, where they may be regularly instructed in the different branches of the profession, and may be examined to see what proficiency they have made."

3839. "Might not the same observation which your Lordship has just made with reference to the celebrity of some distinguished men as lawyers, despite the want of education, or general means of education, be applied to eminence in almost every department, both of literature, science, and art?" — "I quite agree in that. I think, with regard to medicine, the State has a clear right to interfere, and to forbid any one to practise medicine who has not gone through a regular system of education, and has not undergone a regular examination. *And I say the same with regard to law ;* and we acknowledge that principle, by not allowing any persons to practise in our Courts as advocates who have not been called to the Bar by the Inns of Court."

3851. "Would your Lordship say that the Inns of Court them-

selves have sufficient jurisdiction over their own students to prescribe their course of education?"—"Yes, I should; because they may say, 'We will not call you to the Bar unless you do this or that.' They have ample means of enforcing their regulations."

3852. "In the evidence which the committee received yesterday, Lord Brougham seemed to have some doubt as to the power of the Inns of Court to enforce any course of education upon a student, considering that it was a right which each subject had to enter an Inn of Court; and that, being entered, he had further a right to be called to the Bar, if there was no stain upon his character?"—"I do not agree in that. I think that every subject has a right, if there be no stain upon his character, having received a proper education, to be entered at an Inn of Court; and then he has a right afterwards to be called to the Bar. But then I think it depends upon the Inns of Court as to the course of discipline which he shall go through; and they may lay down the conditions, so that they are reasonable, with which he must comply before he is entitled to be called to the Bar. The Inns of Court would be very much to blame, and would be liable to the censure of Parliament, if they were to lay down any capricious or unreasonable conditions; but if they were to say, 'You are not to be called to the Bar till you have attended such and such lectures, and gone through such and such examinations,' I think no one would have any right to complain."

3855. "Your Lordship is aware that the same rule has been extended to the solicitor; that he is obliged to pass an examination at present upon questions of law, before entering upon the duties of his profession?"—"I was not aware of that."

3857. "Do you think that one examination would be sufficient; or would you suggest that there should be frequent examinations during the course which the students have to go through in the Inns of Court?"—"I think there ought to be examinations from time to time."

Next we shall extract some of the evidence as to the effect on the profession of the establishment of lectures.

87. CHAIRMAN. "Do you think that the numbers in the profession are considerably increased?"—MR. STARKIE. "They are, very much."

88. "Do you think beyond due proportion?"—"I should say beyond the number that can be provided for, much. It happened

that, as a matter of curiosity, I wanted to know at what rate they were increasing, and I find that at the Inner Temple we call about thirty young men to the Bar every year. At the Middle Temple they call twice the number; but we are more strict at the Inner Temple, and require a greater number of years, and that has produced an influx to the Middle Temple, and the number there is between 60 and 70. So that if you take the Inner and the Middle Temple together, they make about 100, and you may reckon those about one half the whole number; so that there are about 200 called to the Bar every year; and I took the whole number of barristers, I made a rough calculation out of curiosity, and they amount to nearly about 2800."

89. "Do you think that an educational test would considerably restrict the number at present going to the Bar?"—"I think it would, but it would depend a good deal upon the quantum of information required; of course, the more you require the more you would exclude."

90. "You do not think that such result would be any great evil to the profession?"—"I think it would be no evil at all."

421. "With reference to the general feeling and the present state of legal knowledge upon society, what evidence can you give to the Committee?"—Mr. CREASY. "With the permission of the Committee, I would rather not criticise the present position of my brother barristers, but point out the particular way in which the examination that I suggest would tend to uphold it. I think the preliminary examination would be a guarantee against men not of a high tone of gentlemanly feeling becoming members of the profession at all,—a point which I consider more important for society generally than it is usually considered. I would instance the power of cross-examination, with which every advocate is necessarily invested—the right of examining witnesses as to their character and the previous transactions of their life: *the only practical limit to this consists in the gentlemanly and right feeling of the cross-examining barrister*; for the assertion that it is necessary to test the credit of the witness, and that with a view to test that credit these questions are put, always enables him to urge, if he thinks proper, a series of questions which may be most painful and cruel, and which may be most wanton and irrelevant. This is avoided by a barrister of gentlemanly and honourable feeling, who refuses to lend himself to the solicitations and importunities of the vindictive litigant, who instructs him to ask such questions, not with any reference to the immediate purpose of the

cause, but with the sole object of giving pain to an enemy, and bringing public discredit on him. The extent, also, to which the courts rely upon the honourable feeling of the barrister in stating correctly the contents of affidavits, and recapitulating correctly verbal evidence, makes it most important for the public that the barrister should be, as far as it is possible to secure it, a man of the highest moral and gentlemanly feeling. I do not say, that by ensuring that barristers shall be men of liberal education you will ensure this in all cases, for the highest advantages may be sometimes neglected and abused; and again, it frequently happens, that men who have struggled against every difficulty and every disadvantage in society, by their own natural high feeling will maintain as irreproachable a conduct in these particulars as those who have been most favoured; *but I believe that in the greater number of instances such a test would do good.* It is impossible to imagine any other test that could be adopted in the present state of society; and I think that the test of education, if you want to have men of honourable and right mind, is the best that you can employ."

671. "Have you any other observations which you wish to make to the Committee?"—Mr. EMPSON. "With an improved education and enlarged reading, our law books would be improved too; our lawyers would become more disposed and more competent to reform the law. The best American books on law seem to me to have more range and substance in them, which I partly attribute to the more extensive reading of the American lawyers from French and German works. If you look at the translations by the Americans from foreign jurists, they are much more numerous than the English. The civil law is more studied. The consequence is, such men as Kent and Story. I think, unless something is done more quickly than has been done in England hitherto, that the great advance in improvement of the English law will be effected in America rather than in England."

Mr. James Stewart thus speaks as to the consequences of lectures:—

"Another great advantage resulting from the lectures, namely, that you would create in this country a professorial class, if I may use the term. In France, for instance, one young man takes the department of advocate, and another young man takes the department of professor. They are different departments of the law. The advocate practises the law, and the professor declares what

the law is. It is a distinct class, and a difference which runs throughout the whole of France. A man takes to it as his profession, and it is the same in Germany to a certain extent, and it is even the same in America. From this class, both in France and Germany, and in America, you select the judges very frequently. The fault of the present system in this country in the law, as it appears to me, is, that you merely endeavour to educate men for advocates; you do not attempt to make judges; you merely attempt to make advocates and chamber counsel. Into those two classes you divide your profession. You should, as it appears to me, give some of the honours and emoluments of the profession to the class of law professors, which I think you should create, and which I believe you could create. For example, I can mention two or three instances which will be familiar to you. Monsieur Guizot was a lecturer and a professor, and he is now the prime minister of France; and in the same way Savigny was a professor, and a very eminent professor, and he is now a minister to the King of Prussia, or was so very recently. Now I conceive that if you wish to raise the character of the law, you must endeavour to create that class in this country, and I believe that you can create it. I believe that there is the same material existing in this country, out of which to create it, as there is in France and in Germany."

3671. "In order to encourage the creation of such a class, you think it should be felt that the high honours of the profession were as open to them as to the advocates of the law?" — "I think so. At present you give the whole of the emoluments and honours of the profession to the advocate. We know very well that advocates are often not the fittest individuals to be made judges; we know very well that there are qualities required in the judge which are not always to be found in the advocate. I certainly would not deprive the advocate of these honours; I would give him a share, and a very large share; but I would not give him the whole, and I can only advert to the suggestion which I mentioned, of occasionally making a lecturer a judge. I do not know, indeed, why, as in America, the judge should not lecture himself; we know that Mr. Justice Story, to the very last moment of his life, went from the judgment seat to the lecture room."

3677. CHAIRMAN. "Does the chamber counsel in any way replace, or is he to be considered as a substitute for the legal professor?" — "No, I think not; the chamber counsel merely practises the law in another branch; he is a practiser of the law; there is

no attempt on the part of the chamber counsel to ascertain what the law is; for instance, he is usually a conveyancer; he gives opinions and draws deeds; or he is a special pleader; he is, in fact, a chamber counsel; he does not go into court; he is not an advocate, but he by no means fills up the character of a professor; there is, in short, no class in this country whose business it is to ascertain what the law is."

3680. "Do you think that, in England especially, which is the first country under a constitutional government in Europe, and where more importance is attached to acts of legislation than in any other, it is of greater importance there should be a class such as you describe, whose whole attention should be given to the science of law?"—"Yes; I think that for the reasons I have mentioned it would be of the greatest importance."

The important question whether any other person should be allowed to attend the lectures except members of the Inns of Court, was much adverted to. Some difference of opinion will be found as to this.

778. "Would you give to those persons who happened not to be members of the Inns of Court an opportunity of attending these lectures?"—Mr. BETHELL. "There is a principle, and probably a narrow principle, upon which I would exclude them; and it is this, that I think it is essential for that department of the profession to which I belong, viz. barristers and students for the Bar, that they should be kept apart from other classes of the profession; and if these lectures were open to all, they would be open to attornies, and to the clerks of attornies, and I confess I should object to that intermixture; and on that ground I have not proposed that they should be open to any but students for the Bar, and barristers called to the Bar."

780. "There is another class, the gentleman and the legislator, who would be debarred by your arrangement from such instruction and information, unless he were to go through the preliminary of becoming a member of the Inns of Court; would you object to a little relaxation of the arrangement by admitting him to those courses of international and constitutional law which bore more particularly upon his functions and duties?"—"Yes, I would; and for a reason that I have not yet mentioned, and which it would take a good deal of time to do justice to; and that is, that I wish these lectures not to be examples of speculative teaching, but of practical teaching, and that could not be attained in a very large

or miscellaneous audience. What I mean by practical teaching is this : it has never been according to the genius of the English people (if you may use such an expression) to be content with the acquaintance of mere prelections ; and the consequence has been, that in our universities a kind of domestic practical teaching has usurped the place of, and altogether superseded the more general public prelections which prevail abroad, and are even very general in the Scotch university : and certainly the practical teaching is more suited to our manners, and perhaps to the attainment of that peculiar ability by which as a body of men we are distinguished ; and I should wish that to be observed as much as possible by the readers who are now to be appointed ; and for that purpose, I think it will be essential that every department of study made the subject of lectures, should be accompanied by the perusal with the class of some particular book ; almost in the manner in which the ethics of Aristotle (to take an example) are lectured upon in any one of the lecture rooms of a tutor at a college in Oxford or Cambridge ; and this great object I have would, I think, be defeated if the lecture room were to be thronged by a large and miscellaneous class, which would lead only to the delivery of an attractive discourse by the lecturer, of a popular character, and not perhaps conducing in so great a degree as the other course to the practical benefit of the pupils."

This view is well worthy of attention, but contrary opinions were given by other gentlemen who were examined.

790. Mr. GRAVES. — "I listened with attention, on the last day of the meeting of this Committee, to the evidence of Mr. Bethell, and the only point on which, with diffidence, I felt disposed not to agree with him was, the exclusion of the public at large from the lectures to be given in the Inns of Court. No doubt the admission of those who are not students of the Inn, and not intended for the profession of the Bar, ought to be guarded by regulations, which I am not prepared at present to define, but which I think might be so framed as to prevent the inconveniences and abuses contemplated by Mr. Bethell."

793. "Could not his views be met, and at the same time the public admitted, by admitting the public to certain courses of lectures whilst they were excluded from others?" — "Yes ; I think that a very good suggestion."

796. "Do you think that would be especially of advantage to two classes of the public ; the class of solicitors, for instance, who

are, to a certain degree, equally interested in the improvement of professional education ; and to another class, that of the gentleman who is destined for legislative or magisterial functions?" — "Yes, I think it would be useful to both classes."

861. "What other additional method would you recommend to the Committee, in order to give a really efficient education in any of these departments?" — Mr. TAYLOR, a solicitor of Manchester. "I have listened to the questions put to, and the answers given by the last witness, Mr. Graves, and I think his suggestions are most important with reference to founding colleges, professorships, and any other means of elevating the character of the profession."

862. "With reference to that branch of the profession to which you particularly belong, do you suppose the articulated clerk would have sufficient time to attend to them, in case such lectures should be founded?" — "I think he would ; and that the gentlemen to whom the clerks are articulated, at least speaking from my own neighbourhood, are anxious to give that facility, even though at the loss of some of their own time."

911. "Do you think the Inns of Chancery might be used with advantage for the purpose of establishing professorships and lectureships in law for the use of the solicitors?" — "I should say they might."

912. "Would you prefer such arrangement to a merely voluntary society?" — "Yes."

923. "You think, therefore, it would be much better that a series of lectures should be founded by the state, partly paid by the state, and partly paid by fees?" — "Certainly."

Mr. Amos states his former experience as to lectures.

1264. "Did you meet with many gentlemen who had no immediate professional objects in view, and who might be destined by their position for the office of magistrates, or for the functions of legislators, in attendance on your course of lectures?" — Mr. AMOS. "There were many with me in my private rooms of that class ; I have had a very large number attending the study of law in my own chambers."

1265. "I conclude from your answer to the last question, that in addition to your public lectures, you gave a private-class course in your chambers?" — "Exactly so. It is customary with barristers in this country, for a fee of 100 guineas, to allow gentlemen to have the run of their chambers ; but it was known that

at my chambers I gave rather a more philosophical view of the subject of law, and that I had written on the subjects of constitutional history and law ; and consequently my chambers were attended by a great number of persons who had no idea of making the law a profession. Many gentlemen known in public life have attended my chambers, as the Speaker of the House of Commons, Lord Ashley, Mr. Vernon Smith, Sir T. Fremantle, Mr. C. Wood, Mr. H. Corry, the late Lord Kerry, and, I might add, a long list of gentlemen of rank and fortune."

1266. "Were they regular courses of lectures, or legal conversations?" — "Conversations on particular books and public occurrences."

1267. "You pointed out to your pupils the particular text-books which you thought most advisable to be adopted in the course of their studies?" — "Yes ; books upon evidence ; books upon constitutional law, and the state trials ; some of the more prominent points of the law of property, and the duties of magistrates."

1268. "Did you also employ the means of *vivâ voce* examinations?" — "At my chambers I avoided all formality of instruction ; but at the University, besides the lectures, after the lectures were over, I had a conversation with the class, going round among the pupils, and asking questions, and conversing upon all the points of nicety which had occurred in the course of the lecture, in order to collect their ideas, and to rectify them ; and besides that, I had written examinations for which prizes were given. I had also written examinations upon particular books, Lord Coke's Reports for instance ; I had also prize essays ; and by those different means I created a great deal of enthusiasm among a number of young men. Some of the prize essays at University College have been the embryos of elaborate treatises published in after life."

1269. "Did they hold any meetings of their own for these purposes, independent of the lectures?" — "They had a debating society, of which Mr. Whiteside, of the Irish Bar, was a great ornament ; Mr. Napier was also a distinguished member of this debating society ; and I used frequently to attend the meetings. This society was entirely their own arrangement, but I used to go and talk afterwards to them upon the faults in their reasonings or declamations, or the bad taste which they might show sometimes, and converse with them generally."

3750. "Would you admit to those lectures solicitors as well as barristers?" — Mr. JAMES STEWART. "There certainly is some difficulty in that question. My own opinion is, that the right thing to do would be to throw open those lectures to all the world,

both to solicitors and to any other persons willing to attend them ; and indeed I think it would be of the greatest service that solicitors should attend them ; but in considering the expediency of this course in the first instance, I should very much doubt it. In the first place, I think that the students for the Bar would be more inclined to attend lectures to which they were exclusively allowed admission, and therefore there would be, I think, difficulties in the first instance, in allowing the attendance of solicitors. At the same time, there would be advantages in admitting them in the first instance, and I certainly look forward to admitting them eventually. I should look forward to the establishment of a law school which would be open, as has been done in France and Germany, and in Scotland I believe, to all classes."

3814. "How would your Lordship propose to deal with the professional education of solicitors ; would you allow them to profit by the advantages held out to the higher branch of the profession?"—LORD BROUGHAM. "Decidedly. I would allow them to attend exactly the same classes with the other students. I do not imagine that any of the Inns of Court intend to shut the door against persons belonging to themselves ; I apprehend it is intended to be open to all, and it ought to be open to all."

But, although this is Lord Brougham's understanding, we apprehend it is not proposed to open the new lectures to the clerks of attornies, still less to the public at large. What then is to be done as to this? Public attention having been called to the subject, we do not think it will rest satisfied until a larger scheme is completed. Something more seems to be required in the education of attornies than now exists. The mode of examination by written questions, which is the only one adopted, is an inefficient test of competency.

2029. CHAIRMAN.—"How is the statement which you have now made with respect to the inefficiency of the examination as a test, justified? Can you give to the Committee any instances in confirmation of that statement?"—Sir G. STEPHEN. "I can mention one instance, and a very striking one:—A young gentleman was articled to me some years ago, and during his articles I repeatedly represented to his father that he was utterly incompetent for the profession ; I could make no use at all of him, and at the end of his five years he was not equal to the smallest professional trust ; I mean so far as regarded his skill or his ability.

I then told him, and I told his father too, who was a clergyman, that it was in vain to think to pass an examination; that I thought he would never be able to do it at all, but that at all events, unless he devoted himself to reading and study for a year at least, I did not think it would be possible. I believe that so far as that went they took my advice, for he did not apply for admission immediately, but at the end of a year he did apply, and passed a very creditable examination. I was perfectly astonished at this. I could not have entrusted him to write an ordinary letter on business, and I asked him how he had managed it; and it appeared that he went to a special pleader who undertook the duty of cramming young men for their examination, and he had been crammed by him for six months. But this was not the most singular part of it; he was so notoriously deficient in common sense as well as skill, that he got no business; and getting no professional business, it occurred to him that he might as well try the art of teaching, which had been so successful to himself, and he became a crammer for examinations with that success, that he boasted, whether truly or not, that he had made in one year 250*l.*, by cramming pupils for examination."

2603. "Is it generally considered by the profession, that the present examination is quite adequate to test the knowledge of the future solicitor, and give assurance to the public that he is fit for the discharge of those duties?" — Mr. PAYNE (an articled clerk). "I do not think it is."

2604. "From what you have heard amongst solicitors and articled clerks, it would lead you to the conviction that they required a better or a higher course of examination?" — "I believe it is generally considered, that such a small portion of time as that is not sufficient to test the articled clerk's progress; considering that he is to be five years acquiring his knowledge, they think that each subject is sufficient in itself to take up the entire examination of one day, in the same manner as, at the University and the College of Surgeons, one subject is appropriated to each day, or to a very considerable portion of it; or two subjects, perhaps, to one day, but a very considerable portion of time is allotted to each."

2605. "Would any objection exist, on the part of the articled clerks, to an enlargement of both the time and the subjects?" — "I think not, on the part of the industrious."

2617. "The Law Society, then, in your opinion, does not meet the wants at present existing amongst the articled clerks?" — "I do not think it does."

So much as to the attorney; but we are inclined to think that many persons not strictly belonging to the professional classes might be disposed to attend law lectures. That is, perhaps, sufficiently shown by the evidence we have already given, and by the leading questions of the Committee. Let us see, then, the provision for this as pointed out by the Committee,—the establishment of a Commission, to which should be intrusted the direction of the legal education of the country. It is quite clear that the Inns of Court may, if they please, supersede the necessity for any such Commission; but to prevent it they must take steps with sufficient speed.

310. "In carrying out a system of combined education in the Inns of Court, you think that there would be no objection to a commission under the Crown being appointed to superintend the arrangement for the establishment of such a system, of course, with the concurrence of the different Inns?"—Dr. PHILLIMORE. "I cannot see that there would be. My decided opinion is, that every thing that prevents our education from being merely technical, — savouring too strongly of the attorney's desk, — is good; every thing that calls for a good foundation at first."

311. "In what way would you suggest that such a commission under the Crown should be composed?"—"The most distinguished members of the legal profession."

312. "The first on the Bench and in the different departments?"—"Yes, and some ministers of State."

313. "Do you think that such a commission would carry more weight with it than any body consisting merely of members of the different Inns of Court?"—"I think, certainly."

314—316. "And there would be no jealousy, or objection, excited thereby on the part of these several bodies?"—"I think any such feeling would be more likely to be allayed by the course now suggested than by any other."

670. "Would you recommend that, in order to carry this into execution, a commission, either parliamentary or royal, should be appointed to carry out the intentions of the Legislature?"—Mr. EMPSON. "Yes."

1358. "If a commission or a committee appointed by the two Houses were required at certain periods to review our laws with a view to their consolidation, and the forming them into a system, would that, in your opinion, in any way tend to diminish the

habit which now exists, of basing every thing on technical precedents?"—Mr. AMOS. "Yes, I think it would give a more scientific tone to the minds of the judge and barrister; it would render the law far more accessible to the community, more reasonable and consistent with itself, and more acquirable by systematic study."

1381. "To whom would you entrust without examination the right of admission to the Bar; would you leave it in the benchers of the several Inns of Court, or would you prefer that a general body, composed of benchers from the different Inns of Court, and of members of the universities of Oxford, Cambridge, London, &c. should be constituted for the purposes of examination; or would you leave it to each Inn of Court in particular to determine, by its own examination, the merits of its respective students?"—"Whichever means would create the strongest impression of responsibility upon the mind of the examiner, I should prefer. I am inclined to think that a special board would consider themselves more responsible than the benchers of the particular Inns of Court."

1414. "There might be grounds for apprehending a want of uniformity if either were left to the desultory exertions of separate and independent bodies?"—"Yes; each body would be afraid of making the examination too strict, by which they would drive students from their Inns of Court. Thus, if Lincoln's Inn were to require attendance upon lectures as a *sine quâ non*, a great number would not enter there on that account. The Middle Temple, I believe, now calls many more men to the Bar than the other Inns, because it does not require so long a novitiate, and because it recognises the degrees of the University of London, which the other Inns do not, thereby dispensing with a deposit. This is one of the causes which induce students to take a degree at the University of London."

3766. "In carrying out the system you have suggested, would you recommend that its execution should be left altogether to the discretion of the several bodies concerned, or that a commission should be formed of the members of these bodies, with the power of so arranging as to form out of the whole, one cohering system?"—Mr. JAMES STEWART. "I think the great thing in this, as in other cases, is to obtain, if possible, the confidence of the profession. I think that you would obtain the confidence of the profession more by leaving it to the Inns of Court than by attempting any new institution. In the first place, I think that if

you had any new institution you would run the risk of getting the opposition of those Inns of Court."

Lord Campbell says as to this: "I think it should be left in the first instance to the benchers of the Inns of Court to introduce the necessary reforms. But if they should fail in doing so, I think it would be a very good subject to be taken up by the Legislature."

There seems to have been a good deal of miscellaneous conversation on professional subjects between the committee and the witnesses, and among other things much lego-bibliographical matter. The present reports come in for their due share of censure.

746. "As such reports, from your statement, must necessarily constitute a large portion of the knowledge, and the necessary knowledge of a barrister, would it not follow, from what you state, that the science, as you may call it, of law, is essentially injured by the mode in which you have just stated the reports are taken and published; in other words, by the preference which appears to be given to the technical over the philosophic?"—Mr. BETHELL. "I think it would be absolutely ruined within a short period of time. Some step should be taken for checking the amazing number of reports; I think it will be found to be a most serious evil in the administration of justice. The accumulation of reports becomes now so great a burthen upon the student and upon the judge, that not only is the student unequal to the task of anything like collecting or arranging them, but the judge is in perpetual apprehension lest some conclusion derived by him upon principles may be found to be at variance with some reported decision contained somewhere or another."

747. "On what do you ground your apprehension of the too rapid accumulation of reports?"—"On the vast number of reporters whose works are now deemed admissible to be cited as authorities, and which extend every year to probably, I should think, fourteen or fifteen volumes."

748. "How many reporters are there attached to each court at present?"—"There is no reporter attached to any court, but in each court there is at least one recognised reporter. In some courts a double series of reports are admitted. Besides that, there are hebdomadal publications, and also monthly publications, all of which, as being conducted by barristers whose names are known, are allowed by the judges to be cited."

749. "Do you think that that inconvenience might be remedied by a better system of preliminary education, grounded upon broader and more philosophic principles?"—"In the result, I have no doubt that broader principles of education would check the practice which is too general among us, of substituting decisions for reasoning upon principle; but I think the evil of the multiplication of reports might receive a shorter and quicker remedy by some agreed on resolution by the judges upon the subject.

750. "MR. WALPOLE. Was not that, in fact, the way in the olden times, that the court regulated the reporters?"—"The difficulty of old was this: no report was received without the sanction of the judge in whose court the cases were represented to have been decided. In modern times, that has been deemed liable to be perverted, probably into a means of suppressing decisions which the judge was not desirous should be made public. I do not think that any danger of that kind exists now."

The following account of the election of benchers is amusing. We need not say that it refers, so far as the Inner Temple is concerned, to a by-gone time.

2509. "Are not the benchers, generally, men of the highest eminence at the bar?"—MR. MAHONY. "Not altogether, in either country; there are some of the Inns here in which the office of bencher goes by seniority; if it comes to your turn to be a bencher, you are appointed. I could name a case in point. There was a friend of mine, who is now no more, Colonel Page, he was a bencher of the Inner Temple; he never practised at the bar; he was called, and nothing more, and in about thirty years afterwards he received an intimation that he was a bencher, at which he was very much surprised, he having been a militia colonel; he came to London, and renewed his old acquaintance among his legal friends, and finding it a very agreeable change, he went into chambers, and being found a useful man of business, he was elected¹ treasurer: I knew him when he was treasurer."

We have made these large extracts from this body of evidence, because we consider we cannot render a better service to the profession, than by placing before them the fullest materials for forming a correct judgment on this important subject.

¹ The treasurership is a matter of rotation. — *En.*

**ART. VI. — PRIVILEGE OF PARLIAMENT
RESPECTING ARREST.**

WE begin with stating shortly the case which has recently given rise to the discussion of this very important question.

Mr. T. Duncombe was taken in execution between the dissolution of the last Parliament, and the return of the writ upon a *ca. sa.* issued out on a judgment entered against him for a debt. He was detained in the custody of the sheriff of Yorkshire, by his officers, he being resident in that county at the time of the caption. He applied to the judge in chambers, stating in his affidavit that he had been returned to Parliament at the late general election to serve for the borough of Finsbury, and he claimed his discharge from custody on the ground of his privilege. The judgment creditor resisted this application, on the ground that the privilege did not extend beyond a certain time then expired after the cesser of the Parliament; but the learned judge held the claim of privilege well grounded, and ordered Mr. D.'s discharge.

Much senseless clamour has been raised by the ignorant, the thoughtless, the malignant, against Mr. Duncombe's conduct in setting up his claim of privilege against his creditor's process. He could do no otherwise than he did. He was not only entitled, he was bound to resist the invasion of the right which the law conferred upon him, and which was as much his right as the creditor's was to arrest any person not having privilege of Parliament. First, the debt might not have been really owing, the judgment might have been set aside at law by a court of error, or the execution upon it might have been stayed by a court of equity, and in either case he was not even bound in conscience to pay the sum demanded. But next, supposing it was due in conscience by law, he had a right to avoid personal arrest, and until that law was altered it was his bounden duty not to abandon his privilege as a member of the legislature. He, therefore, is

not only free from all blame, but he deserves commendation for asserting his right, the right of all members as the law now stands; and even if he had admitted the debt to be due, admitted that he had no case on which to shake the judgment or to stay execution upon it, admitted that he had in his hands the means of satisfying the judgment by paying the debt and costs, once arrested, he was bound to take exactly the course which he took and to obtain his enlargement — perhaps, even to proceed in Parliament against those who arrested him, unless some reasonable doubt existed upon the point raised of a dissolution determining privilege. All this is clear enough; the only question which remains is upon the law; the privilege itself; whether it ought any longer to be continued as it now stands, or ought to be replaced by a more rational and more consistent provision. That question we propose now to treat, not at great and, in so clear a case, superfluous length, but so far forth as to bring its merits before our readers.

It is wholly unnecessary to trace the origin and pursue the history of parliamentary privilege. We have here only to deal with one branch of it, the protection from civil process, process in the nature of civil, as for debt or for that which is in substance debt, though in form an offence, as non-performance of an award, made a rule of court. Anciently the claim extended to protection of the servants of members of Parliament also; and if the law was as the King stated in his answer to the prayer of the Commons, 5 Hen. 4., for a statute enacting that protection, viz. “that they had their remedy by law¹,” the claim must have been well founded. It is however to be observed, that they only referred to protection during the sitting of Parliament, and even the penalties by statute denounced against the assaulting of members, were confined to the same period of actual attendance²; and indeed there can be little doubt that all privilege was at first confined to the time when members were actually attending the Parliament. But into this matter we have no occasion to enter. The law has long been fixed that the

¹ Rot. Par. III. 541.² 11 Hen. 6. 11. & Rot. Par. IV. 562.

person of all peers, whether of Parliament or not, of all members of the House of Commons, whether during the session, or during the vacation, or during the interval between one parliament and another, is protected from civil process; nor is it necessary to consider the manner in which this protection is assured to them by the periods of the prorogation, and the date of the return. Suffice it to say, that by law they are protected from all personal arrest except for crimes, or such contempts as amount to crimes, and that therefore, as the law now stands, no peer or member of Parliament is subject to the same jurisdiction in civil matters, to which all the rest of the community are subject.

Is this exemption necessary for securing the independence of the Legislature? That is the question. If it be necessary, no one can doubt that it must be continued; if not necessary, there can be as little doubt that it ought to cease. That is the question. But it is not the only question. For suppose it ever so clear, that to do his duty freely, a member must be exempt from arrest, another question arises; ought those who cannot do a public duty without being placed above the law, to have that duty cast upon them? It may be necessary that men who will not, or who cannot, pay their debts should be free from arrest while they sit in Parliament; but is it necessary that men should sit in Parliament who cannot or who will not pay their debts? We take it that this question can only be answered in one way; and it really makes an end of the whole matter.

No doubt the solvency of candidates is a point which can never be tried either at the hustings or by election committees. But there is another and an effectual mode of attaining the same end, and the Legislature has itself afforded it. By an act passed in 1812, all bankrupts are excluded from seats in the House of Commons, if, at the end of twelve months from their bankruptcy, they have not had their commission superseded, and paid their debts in full. Can any conceivable reason be assigned for not extending this wise and honest law to insolvents? Many reasons, however, and these unanswerable ones, may be assigned why this should be the law for insolvents, if it had never been applied to bankrupts.

Why it is much more applicable to insolvency than to bankruptcy. The trader is exposed necessarily to great risks, and risks against which he cannot by any exercise of prudence or of care protect himself. The acts of foreign powers, the legislative provisions of his own country, the measures of the executive power, the failure of correspondents and debtors at home or abroad, the seasons, the chances of fire and shipwreck, some or even all may conspire against him or involve him in ruin. Hence the law in every country has been merciful to those whose lot it is to encounter so many hazards, and whose fate it may be to become bankrupt without any fault, or any neglect, or even any incapacity of their own. We will not stop to inquire whether this preference is always given upon sound principles, nor is it necessary to moot the point, a good deal discussed — whether bankruptcy and insolvency should be dealt with by different laws as regards the protection of after-acquired property. But, at least, it seems quite undeniable that no preference whatever should be given to the insolvent, and that the bankrupt should in no respect be less favoured. Then what possible reason can be urged in defence of the law as it now stands? The bankrupt is excluded from a seat in the House of Commons, the insolvent is allowed to sit there. Can any thing be more absurd — any thing more repugnant to all principle — any thing more utterly inconsistent in itself?

No one can pretend that the man who, by gross carelessness in managing his own affairs, by profligate expenditure of his own money, has become insolvent, should be entrusted with the management of public affairs, rather than the trader who has failed through misfortune, accidents, and losses against which no prudence could guard him. A gambler, a spendthrift, who borrows what he knows he cannot restore, or incurs debts he cannot pay with tradesmen, is surely as little entitled to sit in Parliament as a bankrupt who may have received the full approval of his creditors — of the Court before whom he was examined.

These positions are so obvious that any further illustration of them would be superfluous. The only ground upon which the present law regarding insolvents sitting in Parliament

can be maintained, is the consideration that the cases are rare. We greatly doubt the fact. But assuredly the cases of bankruptcy are much more rare, and there is this difference between the two classes — that we know and must know all the bankrupts, and we do not and cannot know all the insolvents. The ground of the act 1812 was the scandal of a person sitting in Parliament who could not have a qualification. Is the man who cannot or will not pay his debts certain to have a qualification? But suppose he has the money and will not pay — is the want of common honesty a worse reason for excluding him than the want of three hundred a year? Not to mention that really the property qualifications has become a mere name — the member needs only have it for two days — once at the election, and once when he takes his seat, and men wholly without the property required by the law, evade that law daily, as every one knows.

It is further to be recollected, in speaking of the inconsistency of our present privilege doctrine, that the exempting from arrest peers who have no parliamentary functions, the Scotch and Irish not representatives, really throws a ridicule upon the whole argument which can be urged in favour of any exemption at all. Yet we need not hold it necessary to take all privilege from even those who are peers of Parliament. If the Bankruptcy law of 1812 be applied to insolvents, then whoever either took the benefit of the Insolvent acts, or did not pay a judgment debt within a certain time, say twelve months after the entering up of the judgment, should be held to have vacated his seat, if a commoner, and only to be re-eligible to serve in a new parliament. So any peer of Parliament not paying his judgment creditor, should be sequestrated or suspended from sitting and voting during the same Parliament. The case of peers, not representative, might be more difficult to deal with, because insolvency would expose them to no penalty at all. But this consideration ought not to weigh against the measure proposed; because the two classes of Peers, parliamentary and nonparliamentary, would still have the protection from arrest, and the scandal would be avoided of insolvents sitting to legislate and to judge.

Such, we think, are the only conclusions which can be arrived at on this subject by honest men : and the Legislature will, no doubt, have an opportunity of acting on them in the ensuing session. They will find that a bill has already been brought into the House of Lords, which places the subject on its proper footing. In 1845 Lord Brougham, in an elaborate speech on Law Reform, introduced nine bills, which, although not drawn by the authority of the Society for the Amendment of the Law, certainly met the approbation of its leading members. We believe that five of these bills have already become law. One of these which did not pass was "A Bill for securing the Real Independence of Parliament." We shall conclude this article with it, as it is short, and cannot readily be procured. We trust that the noble lord will renew it on the first opportunity that is afforded to him in the next session.

"Whereas it is highly necessary, for the preservation of the dignity and independence of parliament, that members of either of the Houses thereof who become insolvent, and do not pay their debts in full, shall not retain their seats in the Commons House, and shall be sequestered from voting in the Lords House: And whereas an act was passed in the fifty-second year of the reign of his late majesty George the Third, for preventing such as should be made bankrupt from sitting in the Commons House; but no provision hath yet been made touching such as are insolvent, not being traders, albeit that there is much more reason for regarding the bankruptcy of persons exposed to the risks of trade with favour: And whereas the provisions heretofore made for preventing the delays of justice through privilege of Parliament have not proved effectual, but persons having such privilege do set at nought the judgments and orders of Courts of Law and Equity, to the great scandal of the law; and such persons should no longer be suffered to assist in making the laws which they continually do violate: be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, That from and after the passing of this act, if any judgment shall be given against any peer or any member of the Commons House, for any debt, or for the costs of any action or suit, and execution shall be issued there-

upon, or if any order for the payment of money into Court or otherwise shall be made, and process of sequestration issued thereon, and it shall be found by the return of the said process of execution or sequestration that such peer or member of the Commons House hath not goods or chattels sufficient to satisfy the debt, and after sequestration shall have issued and been executed such peer or member hath not paid the money into Court, or otherwise obeyed the order in that behalf made, or that the debt shall remain unpaid, then and in that case such peer or member shall be altogether incapable of sitting and voting in either House of Parliament, unless within twelve calendar months from the process being issued against him he shall pay the debt, or pay the money ordered to be paid, with costs on the same judgment or order and process: Provided always, that nothing herein contained shall affect any peer or member of the Commons House who shall have brought a writ of error against such judgment, or appealed against such order, and have given security for the payment of the debt or money in case such judgment or order shall be affirmed, in two sufficient bondsmen, to be approved by a judge of the Court in which such judgment shall have been given or order made.

2. "And be it enacted, That the Speaker shall issue his warrant immediately after the expiration of twelve calendar months from such judgment or order below, and one month from the affirmance thereof on writ of error appeal, for the election of another member to serve in place of the member so being insolvent, and whose seat shall be utterly void to all intents and purposes on the expiration of such twelve calendar months and one calendar month respectively.

3. "And be it enacted by the authority aforesaid, That all and every of the powers contained in an act of the twenty-fourth year of the reign of his late majesty George the Third, for repealing so much of two former acts as authorized the Speaker of the House of Commons to issue his warrant to the clerk of the crown for making out writs for the election of members to serve in parliament in the manner therein mentioned, and for substituting other provisions for the like purposes, so far as such powers enable the Speaker of the House of Commons to nominate and appoint other persons, being members of the House of Commons, to issue warrants for the making out of new writs, during the vacancy of the office of speaker, or during his absence out of the realm, shall be and they are hereby made to be in force for the purpose of enabling him to make the like nomination and appointment for issu-

ing warrants, under the like circumstances and conditions, for the election of members of parliament in the room of such whose seats shall become vacant under the provisions of this act."

ART. VII.—FRENCH JUDICATURE.—THE PRASLIN CASE.

IN our last Number we commented upon the proceedings before the French Chamber of Peers at the trial of the ex-ministers charged with corrupt practices; and we took leave respectfully, and with a feeling of kindness, for our illustrious neighbours. The deep interest which we take in their most important institutions induced us to point out plain and fatal errors in their judicial practice,—perhaps, we should rather say, their judicial system; errors, however, which might be corrected without any change in its fundamental principles. That article (Vol. vi. p. 389.) related to the procedure at a trial; we are now imperatively required, by what has since recently taken place, to enter a like protest against their preliminary procedure,—the process of "*Instruction Criminelle*." The lamentable murder lately committed at Paris has given rise to the proceedings of which we complain, in common with all British lawyers, we trust, of many French lawyers also, and certainly in common with all persons of good sense and good feeling, whether belonging to the legal profession or not. It is fit that we begin by a plain statement of the facts; and we have no occasion to premise that our attention is confined strictly to the bearing of these facts upon the question of jurisprudence, nor to tell the reader, that, in all the indignation so universally excited against the criminal, all the pity bestowed upon his victim, all the sympathy every where manifested for her family, not more distinguished than it is respected, we most heartily concur. But the question is one of law and of justice, to be treated upon general principles, as all such questions must in order to be well treated.

In the night between the 17th and 18th of August last, but most probably between four and five of the morning of the 18th, the murder was committed. At seven the magistrates assembled in the hotel (or house) of the Marshal Sebastiani, where the event happened. There were present the Procureur Générale (M. Delangle), the Procureur du Roi (M. Boucly), two examining magistrates, or "Juges d'Instruction" (Messrs. Broussais and Legonidec), and the chief of the secret police (M. Allard). Nothing could be more prompt than the arrival of these functionaries upon the spot; nothing more fit than the presence of these particular functionaries. The investigation immediately commenced. It was continued from 7 A. M. to 5 P. M. In the evening it was resumed, and continued till two in the morning. The premises were diligently examined; all the servants were interrogated; all those who came to the house in the course of the day. Suspicion arising from the position of the apartments, the duke's room and his person were examined; the suspicions being confirmed, he was ordered to be kept in a kind of custody at large, or *garde à vue*, so as to prevent his escaping, or taking any step to defeat the pending inquiry. It is probable that he swallowed the poison before this order was made, and on perceiving himself to be the object of suspicion. But we abstain from all consideration of the questions that have been raised touching his suicide; not because these are unimportant, but because we are dealing with other questions. Suspicion having also arisen, that Mademoiselle De Luzy Desportes, the former governess of the children, had some concern in the crime, she was sought for at her lodgings, and not being there found, her papers were seized. She was afterwards arrested at a friend's house, where she had, it appears, accidentally gone to visit; she was examined by the ordinary magistrates.

In the morning proceeding at the hotel Sebastiani, only the five magistrates whom we have named were present. But at their evening meeting another personage made his appearance. The Chancellor, M. le Duc Pasquier, President of the Chamber of Peers, came, and remained for an hour;

he took no part directly in the investigation. On the next day, Thursday the 19th, he returned; but still he took no part. The reason assigned for his taking no part may by some be deemed a reason for his not attending at all. By the constitutional charter, the Chamber of Peers had no jurisdiction whatever without a royal ordinance; and none such had, of course, been issued, the king being absent from Paris. By the twenty-ninth article of the charter no peer can be arrested, even upon a criminal charge, nay, though taken *flagrante delicto* (with the mainour), until the Chamber issues a warrant authorising the caption; and as it cannot do so until seised of the cause by virtue of an ordinance, we presume it to be clear that every peer has the power, nay, the right, of escape during the interval which must elapse before the Chamber can be convoked. The charter authorises the arresting a member of the Chamber of Deputies, if taken *flagrante delicto*. The courtesy shown to the peers will probably be modified now that men's attention has been drawn to the possible inconvenience arising from it. In the present case, a stretch of authority seems to have corrected the defect in the law; for the Duc de Praslin was detained, and, in legal sense, arrested long before the royal ordinance had issued, and before even an irregular order had been given by the president of the Chamber of Peers. The chancellor, president of the tribunal which could alone try the party, having been present on the 18th and 19th at a portion at least of the preliminary inquiry into the case, nay, as far as the demeanour of the accused was concerned, the most critical portion, because the portion which included his conduct on finding himself to be the object of suspicion, the royal ordinance giving the peers jurisdiction arrived at Paris on the 20th, having been made the day before at a considerable distance from the capital. On its arrival, the president summoned the peers to meet on the following day, the 21st, and in order to obtain a full attendance, he reminded them that the first proceedings were such as could only occupy one sitting. But before they met, consequently, without any authority from them, the president issued his warrant on the

20th, probably at the same time that he summoned the peers. By virtue of that warrant the Duc was conveyed from the hotel Sebastiani to the prison of the Luxembourg, close by the Chamber where the peers met. The president of the tribunal, therefore, which was to try the accused, had largely interfered in the matter of high police, had attended the examination before the police department, and had caused the party, whom the ordinary magistrates had only prevented from escaping, to be cast into prison, without any authority from the Chamber. It is possible that the president's attendance at the examination might be for the purpose of interposing his authority to sanction the order of simple detention (*garde à vue*). The ordinary magistrates may have been unwilling to take this upon themselves. That it was just as much beyond the power of the president as it was beyond theirs, and just as illegal in him as in them seems certain. If there be degrees of illegality, his warrant for imprisoning the Duc before the Chamber met, was more illegal still. We must remind the reader that what we now state proceeds on the supposition, that illegality and irregularity bear the same meaning in France as in this country. It becomes every one to speak with great diffidence on matters of foreign jurisprudence, above all, on points of practice; and we should have abstained from any remark on this part of the case had there been time and cases enough since the date of the charter (1830) for a practice to have grown up or been established.

On the 21st the peers met; they sanctioned, it is to be presumed, the caption which had been made without their authority, — and they directed the preliminary examination (*instruction*) to proceed, appointing the commissioners to carry them on, and to liberate the accused should no ground for further proceeding appear (*mises en liberté*). At the head of the commission was, as a matter of course, the chancellor, and president of the Chamber; for the procedure of our neighbours, drawing no line between the police functions and the judicial, cannot be expected to separate the different classes of the judicial, making one judge examine the sufficiency of the evidence to place a party on his trial, and

another its sufficiency to convict. We have now to observe the course of the examination conducted before the commission, but entirely by the president; who was afterwards to preside also at the trial, in case any should be had.

Now, before adverting to the examination, as our statement must of necessity be intermingled with comment, we must premise that nothing can be further from our intention than imputing any blame whatever to the able and eminent functionary whom we have named. His great age, his long services, his important works on subjects connected with jurisprudence, independent of the high office which he so ably fills, should be sufficient to protect him from the wanton attacks of a candid adversary. But he stands not in need of any such defence. He strictly discharged his duty, — he had no choice but to act as he did; he only administered a most defective system: on that system, not on him, must all censure rest. How vicious it must be needs hardly be added, when, even in such able and experienced hands, it exhibited the scene which we are about to contemplate.

If it were said that the examination of the accused party, standing before the commission in a state of complete exhaustion, apparent to them, though they were then ignorant of the cause, resembled the severe cross-examination of a witness sworn to tell the truth, but concealing it by perjury, a very incorrect description would be given of the proceeding. For no professional man has ever, in this country, made his questions to a witness consist of interrogatory, and abjuration, and lecture, in equal parts. But in France, when the party is under examination, the course is to cross-examine him as a witness, and at the same time to scold him as a culprit; assuming his perjury in the one character, and his guilt in the other. It is the question to which he is submitted, — the question in the strictest sense of the term, provided we admit that there is a moral as well as a physical pain. The object of the process, too, is precisely that of the torture, — to wring from him a confession by making him suffer as much as the resources of the tormentor and his patience enable him to inflict. The result, moreover, of the

two questions is the same. The conflict being between the resources and the patience of the two individuals, the executioner, or it may be the judge, and the accused, a powerful and much-enduring person may escape though guilty, while a feeble individual has been known to confess though innocent. This, however, very seldom happens where the ordinary torture is administered; the possibility of it is always used, and justly used, as an argument against that most barbarous usage; but it is necessarily of very rare occurrence. . So is the confession of guilt extracted from innocent parties of feeble understanding and timid nature by the moral question; but the very same reasons which are assigned in its favour would completely justify the rack: it attains its end in the vast majority of cases; and very seldom makes the innocent confess.

The proceedings in the Duc de Praslin's case opened with the following address from the president to the prisoner: — "You are aware of the frightful crime that is imputed to you. You know all the circumstances which have come under your own eyes, and which do not allow of a shadow of doubt. I recommend you to shorten the fatigue which seems to oppress you, by making a confession; for it is impossible for you to deny, — you cannot dare to deny." The prisoner says that he is too weak to answer, as it would require a long explanation. Now, surely, if the only object of the preliminary examination be to obtain sufficient ground for putting the suspected person upon his defence before the competent tribunal, or for liberating him should he appear clearly innocent, the interrogatory (so to call it by mere courtesy) shows that the commission was in possession of sufficient information already, and there was no occasion to ask for more from the party; but if more was wanted, or if the party was examined in order that his flat denial might help him, then the answer at once confirmed all the suspicions, and the evidence on which they rested, and precluded the possibility of his liberation; for he did not deny the charge, and only said his conduct required a long explanation. This, however, would not satisfy the French law; and the exa-

mination is continued as if, like the old criminal code of countries where torture is allowed, there could be no capital punishment without a confession;—an absurd rule, which is by many held to be the origin of torture. The president, therefore, urges him by reasons more or less strong to confess; says he only requires a *yes* or a *no*; and tells him that a long explanation is unnecessary, of which (be it observed) the party alone could judge, unless the information possessed by the commission were assumed to be both the truth and the whole truth,—and if so, nothing more absolutely superfluous can be imagined than examining the prisoner at all.

The proceeding now takes the form of a cross-examination, and a cross-examination of considerable address. For, after asking several questions so far indifferent as to lull the party's attention, the president pounces upon him with,—“Was your resolution formed when you went to bed?” “No,” says the prisoner. But quickly perceiving that he was caught, he adds,—“But I don't know if it can be called a resolution.” The president, who had just been playing the hawk, now becomes an angler who has hooked his fish, but cannot land him: so he gives him out more line, and lets him swim away, but soon draws him back with,—“Was she not stretched upon the spot where you had struck her for the last time?” “Why do you put such a question?” is all the answer that can be gotten. Questions are next put on the marks exhibited by the Duc's person. He denies that one of them is a bite. “The doctors,” answers the president, “have examined your person, and declare that it is.” Then, surely, we may be permitted to ask why these doctors were not sufficient witnesses to authorise a trial without the prisoner's admission, whether his confession or his denial contradicted by the doctors was wanted,—it being certain that his denial could not aid the other alternative of his liberation. To remonstrance, entreaty, and cross-examination, succeeds lecture and scolding; but first it is mixed with cross-examination in the form of traps laid for the party. “You must have experienced a most distressing moment when you saw, upon entering your chamber, that you were covered

with the blood which you had just shed, and which you were obliged to wash off." Not a word of the blood had been said; consequently, this was as it were sprung upon the prisoner from the depositions in the hands of the commissioners. He says, "The marks of blood had been misinterpreted, and that he did not wish to appear before his children with their mother's blood upon him." It is remarkable that, though this taken by itself amounts almost to a confession, yet the president passes it entirely by, because he recollects that the prisoner had by the former examination been shown to have thrown himself on his wife's body; consequently, the president was apprehensive that he would, if further pressed, set up that explanation. He then goes on to more lectures immixed with cross-examination. "You are very wretched to have committed this crime." The prisoner makes no answer. "Have you not received bad advice which impelled you to this crime?" The prisoner denies it; — and we may observe that this is really the only justifiable question or speech in the whole proceeding, for it is directed to the proper police object, of obtaining a clue to detect other parties. But, whether this police function belonged to the Chamber of Peers is another question. The lecturing is resumed, mingled with coaxing. "Are you not devoured with remorse, and would it not be a sort of solace to you to have told the truth?" The prisoner only answers that his strength fails him; whereupon a kind of wrangle ensues, — the president contending that sufficient strength had been shown to answer some questions in detail, and repeating that all he wanted was a *yes* or a *no*; the prisoner sometimes remaining silent, sometimes saying, "Feel my pulse, and it will show my weakness." His silence is then said by the president to be an admission that he is guilty. The prisoner says, not unnaturally it must be admitted, that the commission had come with a belief of his guilt which he cannot change. Then follows a wrangle upon that, and the mere lecture is resumed, — but in the form of a question, the most absurd that can well be conceived, — "When you committed that frightful crime did

you think of your children,"—a fact which might be material enough for a poet to learn, who intended to make this horrible story the subject of a romance or a tragedy, but absolutely foreign to the investigation of a tribunal whether final or preliminary. The answer being that he had not committed the crime, and that his children are always in his thoughts; here, then, was the yes or the no, so often required; and here the inquiry might have ended, if, indeed, it should not have ended almost as soon as it began. But the president goes on,—“Do you, venture to affirm that you have not committed this crime?” it being we presume required by the French law that a distinct yes or no should be obtained without any addition, and in answer to a distinct question. But the learned judge might as well have rested satisfied with the former answer, for it was a plain negative though obtained in answer to no question at all touching the matter, and only given upon a most irrelevant interrogatory. He went further, and fared worse; for the prisoner only put his head between his hands, remained silent for some minutes, and then said he could not answer the question. The president intimated to him that he might consider himself under arrest,—a statement that could not convey much information to one who had been two days and two nights confined in a private house of his father-in-law, and one day and one night in the public prison of the peers. It is, however, very possible, either that the previous detention, even if regular and legal, was not technically an arrest, or that its irregularity and illegality was to be, if not cured, at least terminated by a more orderly process.

It is hardly necessary to remind the reader, that the manifest guilt of the party in this case can make no difference in the consideration of the proceedings; for these would have been exactly the same had the guilt been quite doubtful, nay, had there been no guilt at all. The accident of the prisoner's weakness, arising from poison, is alike immaterial, for great weakness might have been induced by the horror of a first and unexpected accusation to an upright mind; or it might have been natural, arising from bodily or from mental

defects. Who shall say that the exclamations, or the tears, or the manner, the looks, the gestures, the silence caused by the process of interrogation, might not have afforded the severe grounds of suspicion, nay, belief of a guilt which had no existence, especially when compared with the depositions of witnesses, nay, of a single witness, who, though perjured, would thus be confirmed and believed. It happens that in this instance the weakness was conjoined with undeniable guilt, and only confirmed unexceptionable testimony; but it might have been otherwise: and accordingly the further proceedings were had in a case of great doubt, but in which, instead of weakness, very considerable ability was found to accompany the somewhat suspicious conduct of the party. We refer, of course, to the governess, Mademoiselle de Luzy Desportes; but when we speak of an offence it is only in courtesy to the French law and tribunals, and we are proceeding on the supposition that, causing an illicit passion which leads another to commit a crime is itself criminal—that exposing a jewel to the view of a thief is an offence, provided he steals it—not, perhaps, making the party as it were, an accessory to self-robbery, but still an offence of some kind. Suppose that the thief had been tempted to rob another in order to obtain the means of buying the jewel, we should with some difficulty be persuaded that the jeweller was guilty of an offence, although no doubt his knowledge of the robbery might implicate him. But the French procedure appears to assume that there is an offence committed by the mere temptation; that Mademoiselle de Luzy is not charged with being a party to the murder, or an accessory, appears by the course which her examination takes. It all relates to her general conduct in the family, and repeatedly to her treatment of the Duchess. It is confined to topics of mere morality, without regard to the breach of any positive law; it even turns partly upon matters cognisable by no moral code, but only by the rules of social intercourse in a highly refined, perhaps, a somewhat corrupt, certainly a most artificial, state of society. It is likewise liable to all the objections urged against the examination of the

Duc, as regards the moral torture and the mixture of lecturing and objugation, with cross-examination in all its branches.

It is not necessary to give more than a few portions of the examination, after the fulness of our reference to that of the Duc. The very first question is pointed to a matter of necessity wholly irrelevant either to the guilt of the principal or of the accessory: "Through whose introduction did you obtain your situation of governess in the family?" The judicial curiosity being gratified, after a few questions, somewhat more relevant, the moral lecturing begins: "Did you endeavour, as it seemed to be your duty to do, to bring the children and their mother as much as possible together in heart and spirit?" A long and clever explanation is given in answer to this wholly immaterial question, and to another of a like kind. These statements of the party drew from the president the following discourse in the nature of a reprimand with reasons. "In what you have been saying, you evidently endeavour to throw the whole blame upon Madame de Praslin; but, surely, the deplorable calamity which has terminated her life ought to render you more circumspect in your judgment of her. From the way in which you speak, there is reason to suspect that you did not do what you were bound to do to put an end to a state of things so deplorable, and to bring back to the mother the affections of her children, upon which she had so many claims—of those children over whom you exercised an almost absolute control. The evidence of that control is given under their hand, and under your own. There is reason to believe, then, that you have been far from conducting yourself, under these unhappy circumstances, as you ought to have done?" The answer to this needs not be given, suffice it to say, that Mademoiselle Luzy, here, as in the whole examination, proves more than a match for the commission. But the president replies, and pronounces a kind of interlocutory judgment, that she is amenable for all that had happened. "It would appear from what you say that the whole authority which Madame de Praslin had lost over her

children you had acquired. It was your duty to have prevented such result, which involves you in a great measure in the lamentable consequences which have followed." Her rejoinder is exactly such as might be expected. She loved the children, they loved her. She does not indeed say, as well she might, that even if she had tried to make them love her more than their mother, the step is somewhat long and hard to take between that and causing their father to murder his wife. But the president is not to be stopped either by that difficulty or by the lady's explanation. "Did there not come a moment when you perceived that you were the cause of dissension between Monsieur and Madame de Praslin, and *did you do what was in your power to put an end to such a state of things?*" Here, then, we have a distinct admission by the Court that their inquiry was not confined to legal responsibility, for there cannot possibly be any offence committed of any kind cognisable by criminal law, by merely not doing all we can to benefit one's neighbour. Indeed, a mere non-feasance would, by the laws of most countries, be wholly beyond the cognisance of any tribunal; but suppose the French law to be less strict on this point, as perhaps it ought, and suppose that certain acts of non-feasance (if we can so speak), as suffering a person to swallow poison in ignorance of its nature, are punishable as crimes (which undoubtedly they clearly are), this is not the imputation, or any thing like the imputation made against Mademoiselle de Luzy. She is charged as legally criminal, because she did not exert her utmost endeavours to prevent a man and his wife from quarrelling, and because their quarrel ended in murder. As it would be ridiculous to suppose that the commission could regard this as a participation in the murder, or as making the governess an accessory before the fact, it is clear that they were occupied with the mere question of moral blame — the question how far she had acted like a perfectly amiable, self-denying, disinterested individual, — sacrificing her own feelings to the desire of promoting the happiness of her employers, and doing all that in her lay to reconcile them with each other, and with themselves. She defends herself by stating,

among other things, that any efforts on her part would have been useless, as others excited the same jealousies to which she was supposed to have given rise. Then comes a series of questions, or rather lectures, all applied to the irrelevant subject of vindicating Madame de Praslin from the imputation which Mademoiselle de Luzy's answers appeared to cast upon her temper. We need only give one of these passages: "In your answers to the questions put to you, the whole blame is thrown upon the Duchesse de Praslin. It is very distressing to hear such language from your mouth, particularly to those who have heard the letters which have been read, and who are aware of the promise of a pension made to you, as the reward of your services in her family." The examination closes with severe questions, the only relevant ones which appear to have been put, relating to what had passed between the Duc and Mademoiselle de Luzy, when he saw her before committing the murder, and what knowledge she ever had of his intention: but we have no right whatever to suppose that she had anything to conceal. Our observations on the whole proceeding assume neither that she was guilty, or not guilty; but we conceive it to be manifest that were she ever so guilty, the pressure under which she was placed would have failed to extort any confession from a person of her resources; while one wholly innocent might possibly have given way, and shown emotions which would lead to unfair suspicions, and might confirm testimony itself unworthy of credit.

But in case it should be said that all these matters are part of a preliminary, as it were, a police inquiry, and have no effect upon the judges who are to try the cause, we remind the objectors that four of these judges form the commission, and that it is under the direction of the judge who is to preside at the trial, that every one of the questions and of the lectures which we have cited proceeded; the chancellor, — president at once of the commission to examine, and of the tribunal to judge the accused. If all other arguments failed, if there was no force in the objection taken to the moral torture, surely it deserves consideration whether

judges shall become so mixed up with the proceeding as almost to make themselves parties in the cause.

Some observations on this subject, which appeared some twenty years ago in the *Edinburgh Review*, in a notice of one of Mr. Bentham's works on Evidence, are worthy of attention.¹ The writer justly insists on the distinction which is to be made —

“Between two stages of proceedings, which never ought to be confounded — the operations of police, that are requisite for bringing the accused to trial, and the trial when at length it takes place. While those preliminary measures are in progress, the magistrate and his officers should lose no possible source of information, nor reject any statement or circumstance which may afford the means of tracing up the deed to its perpetrators. Even idle rumours should be listened to, as they may unexpectedly betray weighty facts; and the echoes of a distant hearsay ought to be treasured up by an attentive ear. But when the preparations are once completed, and the charge ripe for decision, there is more reason for narrowing the description of evidence to be adduced, and confining it within some certain and well defined regulations. The means of obtaining proof should be differently regarded from proof itself; and such matters as never can do more than create conjectures, ought not to be permitted to decide finally upon the most important interests of men. Unless some limits be imposed, the judicial understanding is in danger of being bewildered, and lost in the maze.” (p. 175.)

And again : —

“Mr. Bentham's mode of treating criminals and accused persons, does not appear to us quite philosophical. In his balance, their interests and safety seem to weigh very little against his eagerness for the detection of crime and the infliction of punishment. The sacrifices which he is always ready to make for these objects, might lead to the belief that he takes a theological view of the subject, and thinks atonement for sin, expiation of crime by penalty, as something like a religious obligation. Yet, to punish is no matter of indispensable necessity, even where guilt is manifest, while, to abstain from punishing without a perfect legal warrant, is a simple but a most sacred duty. The escape of

¹ Vol. xl. (1824.) We have reason to suppose that the writer of this Article is now one of the greatest ornaments of the Bench.

an offender he deems a public calamity; yet, its occasional occurrence does not appear to us to reflect such extreme discredit on a judicial administration, since courts of justice are composed of men, and no temporal authority guarantees its own omniscience, or sets up the claim of infallibility. This obvious consideration may go far to excuse those in whose hand the sword of justice sometimes misses the guilty head; it may even have some effect in consoling him who has committed the opposite error, and mistakenly suffered it to destroy the innocent; but it ought to teach the utmost caution and anxiety for avoiding so terrible an evil. Yet, in the frame of mind in which many passages of this work were composed, Mr. Bentham certainly regarded this great evil with an indifference that has surprised us. He calmly weighs in his balance, the *inconvenience* of condemning the innocent against that of suffering an offender to escape. He argues, that the danger resulting from the acquittal of a criminal is possibly greater, though less striking, than that which arises from the punishment of the guiltless; for, that, the effect of absolving a thief is the commission of more thefts, while it does not follow, from the conviction of an innocent man, that others also innocent must be convicted. The danger, he says, is more apparent than real; the alarm is greater than the danger; or, in other words, the real danger is not so great as the apparent. In a word, he treats this as a case in which imagination takes the place of reason. He qualifies his practical proposition indeed, by admitting that 'the evil of an unjust punishment for theft greatly exceeds the evil that would have arisen from new thefts, committed by the absolved felon; and that a judge ought to act upon the presumption of innocence, and, if in doubt, to consider the mistake of acquitting as less injurious to society than the error which condemns. In listening to the voice of humanity, we follow only that of reason.' He then warns us against 'sentimental exaggerations' tending to give impunity to crime, under the pretext of giving security to innocence; and, he proceeds, with a jocularly which we cannot consider as seasonable, to cast some ridicule on the homely adage of English law, which pronounces it better that ten, or perhaps a hundred, guilty should escape, than that one innocent man should suffer death by legal process." (pp. 179, 180.)

We cannot resist quoting the following eloquent and just eulogium on the labours of Sir Samuel Romilly, because it has a general application.

"The moderate improvement first suggested by him in 1809, wisely calculated as they were, to relieve the administration of justice from an odium which did not fairly belong to it, and so to secure its calm and impartial execution, procured for him the usual calumnies and sarcasms; he was not only held up as a vain and wrongheaded speculator, eager to destroy our venerable institutions by setting wild theories in the place of sage experience, but denounced as a Jacobin, a lover of strife, an hypocritical pretender to humanity, a promoter of crime, an enemy to the establishments which form the safeguard of society. His projects were assailed by the whole tribe of ministerial lawyers in Parliament, from the Lord High Chancellor down to the meanest candidate for a Welsh judgeship. The twelve judges of England stepped down from their pedestals, and through Lord Ellenborough, then Chief Justice of England, favoured the House of Lords, for the first time, with an unasked opinion respecting a matter, not of law, but of legislation, declaring against any abridgment of their own powers of life and death. The motion was annually renewed; but supported by minorities, in point of number contemptible; and one single measure of mitigation was alone effected in the lifetime of the author of the reform. Since his death, Sir James Mackintosh has pursued the subject in a manner worthy of his cause, his predecessor, and himself; and, having succeeded in obtaining, in 1819, an inquiry before a Select Committee, he has since procured the abolition of capital punishments in a variety of cases. But this is not all. Several statutes exempting from capital punishments some where about an hundred felonies, were introduced during the last session into the House of Commons by Mr. Peel, the Secretary of State for the Home Department, and they passed without a dissentient voice, — without a whisper of dissatisfaction, except from the friends and disciples of Sir Samuel Romilly, who contended that something more ought to be done. The bills were carried to the Lords, and passed through all their stages unanimously, without even a debate, though Lord Eldon at that time presided over the deliberations of that assembly! The royal assent was given without any difficulty, to measures represented as thus mischievous and alarming, about fourteen years from the date of their first suggestion.

"And such is the ordinary routine. Common sense requires an obvious improvement: an opposition member brings it forward, and is overpowered by sarcasms, invectives, and majorities; but public opinion decides at once in its favour, and gradually

diminishes the majority in each succeeding year, till the scale is turned, and independent men of all parties become anxious to see the alteration effected. Suddenly the minister proposes the reprobated project as a government measure, and converts, while he laughs at, his former adherents. Mr. Peel's five acts, in the session of 1823, for effecting Sir Samuel Romilly's proposals, have not been so much celebrated as they deserve, because they still leave one great reformation unaccomplished, we allude to the abolition of capital punishment in the case of forgery ; for, in parliamentary tactics, it is well understood that those who fight for principles must complain as if nothing was done, while any thing still remains to be done. 'The concessions, however,' which have been made with respect to the other felonies, must gradually lead to the same result in the case of forgery ; and we must not be deterred from glorying in the victories actually achieved in the cause of justice and humanity, merely because they might have been more perfect and satisfactory. To record such triumphs, is to excite public men to similar exertions for the future, by the certain prospect that, sooner or later, in their lifetime, or after their death, through evil report and good report, public opinion will finally award the palm of victory to truth." (pp. 181-183.)

But we have been tempted from the direct path of extract. Let us continue :—

"Strong objections are stated to another English practice, arising from the maxim *nemo tenetur seipsum accusare*. And the French method of interrogating persons under a charge, for the purpose of obtaining that result, is warmly preferred to it. The argument is stated with force and ingenuity in the eleventh chapter of the seventh book *De l'Inculpation de soi-même*. But we cannot afford to insert it.

"If the nerves stood always firm, and the mind remained untroubled, when a man is brought before a magistrate charged with a crime, and if, moreover, he could be sure that he knew all the proofs upon which the suspicion is founded, we might find it difficult to contend against these propositions. But if the contrary of all this is manifestly the most probable, if the mere fact of being accused—a fact reckoned upon and provided for by the experienced offender, is in itself an overwhelming calamity to an innocent man, and the more so, in proportion to his abhorrence of the crime, we must pause before we agree in the propriety of exacting any explanations from him. How open to misconstruction

will be his language, his gestures, his very looks? How easy to attribute to feelings of shame the glow of indignation, and confound the agony of undeserved reproach with remorse or fear? All the explanations which can be offered may possibly be inadequate, and then they recoil upon the accused; or they may even excite new suspicions, from coincidences merely accidental, which may also possibly defy explanation. Perhaps he is the victim of an artful conspiracy, arranged by the real offender; or the appearances that accuse him may admit of no elucidation, which will not either betray secrets important to be kept on other grounds, or compromise the safety of other persons justly entitled to protection from the accused. A smuggler or poacher detected in combining his own clandestine measures, is naturally implicated in a horrible crime committed near the same time and place. An anatomist is discovered (in one of Holcroft's novels, according to our memory) with a bloody knife in his hand, leaning over a body newly torn from the grave, — and the purpose of dissection is one that he is by no means anxious to avow; a love intrigue has perhaps thrown him in the way of suspicion, and the party can hardly be expected to purchase his liberation by an instant avowal of the truth. The incident of a son apprehended with the sword yet reeking with the blood of his murdered king, which had just been placed in his hands by his father, however extravagant the incident, serves well for an example. The son must convict his father of regicide, or abide the suspicion against himself. In the real case of the Maid of Palaiseau, she was bound to suppress her own vindication by the dread of giving up her father to be shot for a deserter.

“The imagination need not be taxed, however, for extreme cases, in which silence, equivocation, or even falsehood, — the ordinary badges of guilt, — would naturally be found in company with perfect innocence. There are many in which the truth, properly brought to light, would set free the accused; but his very situation disqualifies him from doing justice to his own statement. Conscious of his rectitude, and proud of his character, he is abashed, humiliated, and confounded by the charge. The untoward chances that have loaded him with suspicion may go on to his utter ruin; the false witnesses, who have now established a *primâ facie* case, may ultimately convince his judges. That he should ever become an object of accusation would have struck him yesterday as more impossible than that accusation should now lead to conviction; the last step seems far less violent than the

first; and the commencement of his process is a fatal augury which teaches him to despair of its issue. To his distracted mind justice is brought into discredit and distrust, and Providence itself appears to be in league with his secret enemies. In this state of mind he is required to stand the cool and acute cross-examination of one habitually severe and suspicious, already pre-occupied with partial statements against him.

"The recommendation to exhibit interrogatories applies equally to the preliminary proceedings and the moment of trial. But here the direct and candid Dumont defends the English practice in preference to that of France.

"L'Interrogatoire des prévenus est souvent accompagné d'un genre d'abus qui, même sur le continent, a donné bien des partisans au système Anglais. On voit un juge irrité par la résistance, les évasions ou les négations de l'accusé, devenir sa partie adverse, le fatiguer de questions, chercher à le surprendre d'une manière captieuse, l'intimider, lui faire subir une sorte de torture, et s'engager, par amour-propre, dans une lutte où il perd son caractère d'impartialité. Ces moyens semblent supposer qu'on exige l'*aveu*, et cependant l'*aveu* n'est point nécessaire; ce n'est pas l'*aveu* qui doit être l'objet de l'enquête; c'est l'ensemble des circonstances qui prouvent le *fait*. On devrait se borner à interroger le prévenu lorsqu'il y a des lacunes dans le témoignage, lorsque ses réponses vrais ou fausses conduiront à les remplir. Si tout est prouvé sans lui, s'il n'a rien à dire pour sa défense, qu'a-t-on besoin d'interroger? Je ne voudrais pas l'exclusion de ce moyen, mais son économie.

"Depuis que j'ai suivi notre tribunal à Genève, j'ai vu des cas où, sans la faculté d'interroger le prévenu, on n'aurait pas pu le convaincre. Ce n'est point son *aveu* qu'on demandait, mais, on lui adressait des questions qui confirmaient les témoignages ou conduisaient à de nouvelles preuves."

"This keen encounter of the wits between judge and culprit, these unseemly bickerings between two persons so widely removed from each other, have a direct tendency to degrade the dignity of justice, because they always disturb its calmness and serenity. It is easy to foresee which side will have the best of the argument. The master of thirty legions had no such advantages, as he on whose mercy the life of his antagonist lies. The base vulgar, indeed, will be seen cheering on the stronger party to the confusion and dismay of the weaker, and the worshippers of power always adore it most fervently in its excesses; but every generous and

feeling mind listens with silent indignation, and retires from the debate with diminished respect for the law, and a diminished sense of his own security. Several of the recent trials in France afford lamentable specimens of both results ; but as the lowest point of judicial degradation must always be sought in political prosecutions, we may hope that it settled at zero in the disgusting exhibitions at Saumur, in 1822.

"The notion that interrogatories partake of the nature of the ancient *question*, here ridiculed as a prejudice, is just. We might perhaps rely on what we have written, to prove that the state of accusation is itself a state of torture. The object of attaining truth does not sanctify such means, for that object was, no doubt, accomplished in the great majority of cases where bodily torture was applied : but it should be remembered, that even truth may be bought too dear ; that its attainment is by no means secured after all ; and that if the sources from which it may be derived are by this method increased, the false impressions may be also multiplied beyond the power of correction. But, further, the supposition is that the party is constrained to answer. But by what means ? We can imagine no other than a stern admonition that, if he refuses, the most unfavourable construction will be put upon his silence ; or, in other words, the probability of his being punished for the crime charged upon him will be so far increased. The old inquisitor said, 'The rack is ready, unless you answer all my questions ;' the modern inquisitor says, 'Your refusal to answer will most likely bring you to the guillotine.' Each applies itself to the fears of the party, directed in one case to impending torments, in the other to judgment and execution, not quite so near at hand. If the threats are carried into effect, the latter is the more objectionable, because it implies a perversion of justice ; it is a solecism not to be tolerated, — 'We will punish the contumacy of your silence, by condemning you for a crime which we do not know you to have committed.' No such consequence, indeed, can follow in any country where judgment is to be obtained through the medium of a jury, for they decide according to the evidence, and not upon presumptions of law. In these realms, therefore, the introduction of compulsive interrogatories is happily impracticable." (pp. 187—190.)

We have no right to make such free use of these excellent observations, taken from a source so familiar. But we are desirous of transferring them to our own pages, in the hope

that, in their more recent form, they may reach some quarter of Europe in which the French procedure is adopted; and that, as legislators are now considering these matters, more especially in Germany, a new procedure may be adopted.

It must not be supposed from any thing we have been urging, that we at all approve the overstrained care of some judges with us, and of most justices, to prevent persons accused from confessing.¹ Whatever a party pleased voluntarily to tell, and especially on the moment of his being seized and charged, is of the greatest importance to the inquiry concerning his guilt; and no magistrate, we think, does his duty who goes one step beyond letting the prisoner know that what he says may be used against him. We have even more than doubts whether that warning is not going too far. Here, again, we shall give the opinion of the writer we have already referred to. He laughs at

. . . . "those English justices of the peace, who seem alarmed at the least chance of hearing truth from a culprit, and so earnestly entreat him to disclose nothing that can ever tend to bring guilt home to him. They are rather to be admired for romantic generosity, than for wisdom, or any beneficial consequences resulting from that conduct to the public. Innocence may be deprived of great advantages if deterred from promptly telling its own unvarnished tale; to keep back full information, is, in some events, nearly equivalent to confessing guilt; and the warning which prevents the story from being related at the earliest moment, may prevent it from producing at any time its just effect. But supposing that the culprit, eager for his release, should choose to commit himself by falsehoods, or betray real facts which go to his conviction, we cannot conceive that any harm is done. Between the opposite methods of compulsive interrogation, and an indiscriminate injunction of silence, common sense suggests a middle course, which leaves the party to judge and act for himself. If he is blessed with self-command, and is in possession of the means of at once refuting his pursuers, why should his vindication be delayed? but as he may be incompetent to do so, or unprovided with the necessary proofs, let him be calmly told by the magistrate that no unfair inference will be drawn from his reserving his defence for a more convenient season."

¹ See *anti*, Art. II.

The proceedings in France were, if possible, more objectionable upon the late occasion in another and a very material particular. The whole of the unfortunate duchess's papers were produced in Court, and of course found their way into the public papers. That lamented person's letters, and even her diaries, the records she kept of her communings with herself, and the secret thoughts of her heart, which for relief to her feelings she committed to writing from time to time; her suspicions, well or ill-grounded, her suppositions real or imaginary, in a word — and it is the word she seems to have herself employed — her “impressions,” — and these respecting the very party, and her conduct under trial, were thus made public. Whether Mlle. de Luzy is ever brought to trial or not can make no difference in the reprobation justly given to such proceedings. Enough is it that she was at the moment in a predicament which made her trial more than possible; she was under examination with a view to determine whether she should be tried or not. To all intents and purposes, as regards this matter, she must be considered as a person about to be tried — and can any greater outrage on every principle, we will not say of correct procedure, but of common justice, — than that the judicature which was possibly to try her, and was at the time occupied in the preliminary inquiry, should fill their own minds and those of the whole community with matters most prejudicial to the accused, and not one of which could be received legally in evidence against her.

It is unnecessary for us, in conclusion, to disavow all disrespect or unkindness to our intelligent neighbours the French, or their institutions. We have shown no disposition to take insular views of our own law, and we are not only willing, but anxious to adopt the maxims, and even the practice, of foreign countries when they deserve it. The deplorable crime which has led us to make these observations, brought down much ignorant abuse on the national character, and more especially on the higher classes. We entirely disavow all such attacks because they have no foundation in truth or justice. We confine our remarks to their criminal procedure, and there we think they are wrong.

The senseless and the wicked clamour which a portion of the French—let us rather say the Paris press, has raised on this melancholy occasion against the upper classes of society and the established order of things, to serve the purposes of party, indeed to promote mere anarchy, cannot be too strongly reprobated; and we are on this as on all other occasions, apt in England to look down upon our neighbours as if our newspapers were free from all such blame. We are unwilling to make comparisons, and we even are perfectly disposed to believe that the superiority is on the side of our countrymen. But how much have our neighbours to reproach us with? What part of the French press can be pointed out as even approaching our own in the melancholy exhibition of folly and of slavish spirit made on every occasion of the royal family moving in any direction? Nay, what newspaper in the most despotic government or Italian principality ever approaches the gossip and the adulation of "*Our own Correspondent*," as often as our princes travel? The Court is besieged; all attempts at excluding "*Our Correspondent*" prove vain; the royal personages have no chance of privacy let them go ever so far into the wilds. In vain they shut themselves up and allow none to enter the precinct. No works that can be thrown up avail. If counter-works prove impracticable from the nature of the ground, recourse is had to the trees; and there "*our justly-valued and accurate correspondent*" perches, that he may report every motion he can, with the naked eye, or it may be, with his glass descry. Then the narratives given mock all description. An illustrious person is seen to angle,—the fall of the fly upon the water, and the quivering motion of the line is promptly recorded, when H. M. or H. R. H. had a nibble! We state the literal fact—and, possibly, the blame rests not with the press; this we are in justice and candour bound to admit. The people of this country are chiefly amenable for such disgusting exhibitions of vulgar curiosity and low adulation. The people require such vile food to gratify such low appetites; and no other people in the world shares the same depraved taste. A similar propensity, with the mixture;

doubtless, of more sordid views, leads, we see every day, to overwhelming the royal family with presents, which are of course rejected. But surely this lamentable folly and meanness are encouraged by the press, and, in the instance of reporting royal progresses, it pampers and increases the appetite for which it caters. Every lover of his country desirous to preserve her honour; every friend of the press, wishing to preserve its dignity and extend its usefulness, must join in the sentiments which we have felt bound to express.

ART. VIII. — SECONDARY PUNISHMENTS. —
CONGRES PENITENTIAIRE.

*Second Report from the Select Committee of the House of
Lords on Juvenile Offenders and Transportation (1847).*

It is exceedingly difficult, in the punishment of criminals, to divest the mind of all desire of vengeance. Our legislators have long ago disclaimed it; but, in this respect, the spirit of the law is advanced far before the mass, which it should govern. This feeling is, to some extent, nourished and kept alive by the public execution of criminals; and but few among the crowd return from that awful sight without a vague feeling that society has had its revenge. The same sentiment exists in connection with all other punishments. There is a secret pleasure in hearing that a mean rascal is to be whipped at the cart-tail; and we see strong symptoms of a wish to revive this punishment, not only for juvenile offenders, as to whom it was partially restored last session, but as to adults. This hankering after vengeance will also be found to mix itself up, and with, the vulgar idea of imprisonment. It is not agreeable to think that a felon suffering this punishment is enjoying any kind of comfort. Every man's hand should be against him; and, if occasionally he were found dead in his cell from starvation, it would not

cause much regret. Sitting surrounded with comfort and luxury, rich and fat, it is not disagreeable to the mere sensualist to imagine that the fellow-creature who, from his evil nature or his bodily want, has raised his hand against another, or even unlawfully deprived him of a part of his property, is living on bread and water, shut up in a cell seven feet by two, and, possibly, loaded with fetters. If an attempt is made to check this feeling, and to lead the mind into another channel, the person doing so runs the chance of being secretly thought, or openly proclaimed, a "sentimentalist," to which the adjective "sickly" is sometimes added, — a "sickly sentimentalist;" or he is called, in milder phrase, "romantic," which is softened by the qualification of "amiable," — he shows "romantic amiability," or "amiable romance." But a faint prejudice is created against him; and it is even possible that some one in the company will instinctively button his breeches-pocket.

Here, however, another question arises. Admitting our full right to inflict any degree of punishment on offenders, are we quite sure that we are acting wisely for our own interests in making punishment our only object? However grateful to our minds the misery of criminals may be, is it the only thing to be attended to? We have been trying the plan a long time: the rack is now left to the showman; the gibbet makes its appearance only occasionally; the knout has given way to the cat; and the power to use the latter is greatly diminished. But we have tried all these punishments and many others without effect. The great warrens of crime still exist, and breed in and in. We trap and hunt their inhabitants; but, so far from extirpating them, they daily increase on our quarters.

Have we, then, taken the right method of treatment? or, at all events, is there any other mode of treatment in our power? It may be pleasant to punish the criminal; but the existence of the crime is inconvenient. We do not know when it may affect ourselves. The thief comes out of gaol a thief still, and takes to his trade again; his children do the like. It is a business, a profession, with its ups and downs, its ranks, its risks, its prizes, and its blanks; and it is followed

as a mode of living by thousands. The only means, not of breaking it up (for that is impossible), but of preventing its increase, is by showing that a safer and better trade may be adopted. The persons who now follow it can usually follow no other. For one who takes to it from liking, nine resort to it from necessity. No. 1. is irreclaimable, but the nine may perhaps be recovered. At present the state supports all the ten, when in prison, by providing food, lodging and clothing; to which, when out, they help themselves. Putting aside all sentimentality and romance, and hating most cordially the felon, and wishing to render him miserable, are we not standing in our own light in our treatment of him, and, in fact, not spiting him but ourselves? We cannot carry punishment beyond a certain point. Persons will not prosecute; and even juries are often composed of those sickly sentimentalists, and will not convict: and the criminal gets off scot-free. When the feeling of society reaches this point, some alteration must take place. We must look to what punishments remain to us. They are fast slipping through our fingers. M. Van Meenen, the president of the Belgian Court of Cassation, on the 20th of September last, in his address to the Congrès Pénitentiaire at Brussels, thus enumerated them:—

“ De tout cela que reste-t-il?”

“ 1^o. *La peine de mort*, tolérée provisoirement, vivement combattue, mollement défendue et rarement exécutée :

“ 2^o. *La marque* ;

“ 3^o. *Le carcan*, que le pouvoir maintient timidement, que les mœurs repoussent, que la raison et l'expérience condamnent ;

“ 4^o. *L'amende*, peine dont la détermination rationnelle présente un problème à peu près insoluble d'abord, parce que, fixé même entre un maximum et un minimum, elle est d'une monstrueuse inégalité ; nulle pour le riche, dont elle entame à peine le superflu ; ruineuse pour le coupable pauvre, et souvent pour des innocents dont l'existence dépend de la sienne ; *secondement*, parce que, laissée à l'arbitrage absolu des juges, elle n'échappe à une monstruosité que par une autre, c'est-à-dire, elle ne sauve l'inégalité que par la confusion du pouvoir législatif dans le pouvoir judiciaire ;

“ 5^o. Enfin la *dégradation civique* ;

“ 6°. Et l'interdiction de certains droits civils, et de famille.

“ L'immense lacune que le petit nombre de peines laisse subsister dans nos codes, en même temps que la nombre des délits et des infractions, s'y accroît sans cesse avec la multiplicité et la complication des droits et des intérêts que le progrès social fait naître, ne peut être comblée que par l'emprisonnement, dont les travaux forcés et la réclusion ne sont, en réalité, que des modes.

“ Car, remarquez bien, Messieurs, que la déportation et le bannissement, bien qu'écrits dans nos lois, ne font réellement point partie de notre échelle pénale. La déportation n'est possible en Europe que pour l'Angleterre qui est sur le point de l'effacer de la législation, tant elle est onéreuse et répond mal au but pour lequel on l'avait adoptée. Quant au bannissement, son application, presque sans exemple, est peu compatible avec les traités, les principes et les usages qui régissent aujourd'hui les rapports internationaux.”

M. Van Meenen was premature, we think, in saying that transportation is to be effaced from our legislation in this country; that point, we apprehend, will require further deliberation and investigation. But otherwise, we think he has correctly stated the catalogue of European punishments. What then is to be done? The remaining hope is to punish, but to punish with the hope of reforming. One mode of doing this may be considered as now established, and has been already made known to our readers, — the separate system. It may be said to have received a European sanction. The only questions that remain are, to what extent, and to what persons it should be applied. The resolutions which were come to on this subject at the Congrès Pénitentiaire at Frankfort, in September, 1826, may be interesting to our readers: —

“ *Rappel des Résolutions prises par le Congrès Pénitentiaire de Francfort, dans les séances des 28, 29 et 30 Septembre, 1846.*

“ *Première Résolution.* — L'emprisonnement séparé ou individuel doit être appliqué aux prévenus et aux accusés, de manière qu'il ne puisse y avoir aucune espèce de communication soit entre eux soit avec d'autres détenus, sauf dans les cas où, sur la demande des prisonniers eux-mêmes, les magistrats chargés de l'instruction jugeraient à propos de leur permettre certains rapports, dans les limites déterminées par la loi.

“Deuxième Résolution. — L'emprisonnement individuel sera appliqué aux condamnés en général, avec les aggravations ou les adoucissements commandés par la nature des offenses et des condamnations, l'individualité et la conduite des prisonniers, de manière que chaque détenu soit occupé à un travail utile, qu'il jouisse chaque jour de l'exercice en plein air, qu'il participe aux bénéfices de l'instruction religieuse, morale et scolaire, et aux exercices du culte, et qu'il reçoive régulièrement les visites du ministre de son culte, du directeur, du médecin et des membres des commissions de surveillance et de patronage, indépendamment des autres visites qui pourront être autorisées par les règlements.

“Troisième Résolution. — La résolution précédente s'applique notamment aux emprisonnements de courte durée.

“Quatrième Résolution. — L'emprisonnement individuel sera également appliqué aux détentions de longue durée en le combinant avec tous les adoucissements progressifs compatibles avec le maintien du principe de la séparation.

“Cinquième Résolution. — Lorsque l'état maladif du corps ou de l'esprit d'un détenu l'exigera, l'administration pourra soumettre ce détenu à tel régime qu'elle jugera convenable, et même lui accorder le soulagement d'une société continue, sans cependant que, dans ce cas, il puisse être réuni à d'autres détenus.

“Sixième Résolution. — Les prisons cellulaires seront construites de manière que chaque prisonnier puisse assister aux exercices de son culte, voyant et entendant le ministre officiant et en étant vu, le tout sans qu'il soit porté atteinte au principe fondamental de la séparation des prisonniers entre eux.

“Septième Résolution. — La substitution de la peine de l'emprisonnement individuel à la peine de l'emprisonnement en commun doit avoir pour effet immédiat d'abrégier la durée des détentions, telle qu'elle est déterminée dans les codes existants.

“Huitième Résolution. — La révision des législations pénales, l'organisation par la loi d'une inspection des prisons et de commissions de surveillance, l'institution d'un patronage pour les condamnés libérés, doivent être considérées comme le complément indispensable de la réforme pénitentiaire.

“N. B. — Les résolutions 1 à 3 et 5 à 8 ont été prises à l'unanimité ou à peu près à l'unanimité ; la résolution 4 l'a été à une très-forte majorité.”

The account which Colonel Jebb, the Surveyor-General of Prisons, gave at the meeting at Brussels, in September

last, of the progress of the separate system in this country, is important.

“ Lieutenant-Colonel Jebb (Surveyor of Prisons) said, he was instructed by the Secretary of State for the Home Department to lay before the Congress the fullest information as to the present state of the question in England. He then stated the number of prisons that had been erected on the model of the Penitentiary at Pentonville, and in which the separate system would probably be enforced—one at Wakefield to receive 800 prisoners; a House of Detention in Middlesex for prisoners before trial, for 280; in Perth, for 400; in Belfast, for 320; in Leeds, for 300; in Stafford, for 290; in Aylesbury, for 280; in Reading, for 236; in Northampton, for 200; in Leicester, for 190; and others, amounting in all to forty prisons, calculated to receive 5,500 prisoners. Prisons of the same kind were in progress at Liverpool, Kirkdale, Manchester, Birmingham, in Warwick, a government prison in Dublin, a new county prison at Winchester, at Springfield, at Knutsford, and other places, making twelve prisons to receive 4,280 persons, which would most probably be finished in the course of the next year. Others were under consideration for Bedford (county), Plymouth, Exeter, Surrey, Canterbury, and Maidstone. These when completed would contain about 3,000 prisoners; and in three years from the present time it might be expected that there would be prisons enough in England on the improved system to hold from 12,000 to 13,000 prisoners. He had no doubt that separate confinement would in future form the basis of prison discipline in England. Magistrates who at first were opposed to the system, now approved it. There had been no formal recognition of the system, either by the magistracy or the legislature, but it was generally approved, and they were in a position to carry it into effect whenever it should be formally sanctioned. During the past session the question of transportation had been before the legislature, and, in the form in which the punishment had hitherto existed, the government had determined to abolish it. No final determination had been come to on the subject, but he believed the system to be adopted would resolve itself into this:—all criminals now under sentence of transportation would undergo a separate confinement, then a period of laborious discipline; having completed that, they would be sent as exiles to an English colony—probably Australia. In pursuance of this arrangement, it had been proposed to locate 1,200 convicts in the Isle of Portland, to be employed in the erection of a breakwater. The build-

ings in which they would be placed were movable ; the convicts would be separated during the night, but associated in their labour during the day. The preparations would be completed by the spring. This," he said, "was about the whole extent of the progress which the question had made in England."

The opinion of the Committee of the House of Lords on Transportation, as to the separate system, is as follows :—
 "The separate system, where it has been fairly tried, seems to supply exactly what is needed for forcing the mind to self-communion, and allowing this to be broken only by communication with those morally the superiors of the convict. Nor does this system, on the balance of the evidence, appear to the Committee to be inconsistent with the health of the prisoners in body or mind, although on this last point there is a difference of opinion, some witnesses regarding this discipline as hurtful ; not indeed to the structure and functions of the understanding, but to the energies of the will. On this subject the Committee would recommend, first, that great care be taken in administering the system of separate confinement with labour ; and secondly, that the number of prisons adapted to the practice of it be multiplied. (*Second Report* (1847), p. 5.)

But although the separate system is worthy of general adoption, it must not be supposed that this is all that is necessary. In fact it is simply the best mode of imprisonment, and that is all. Its applicability to all criminals, and to all ages, is matter for grave discussion, and many points respecting it came under the consideration of the meeting at Brussels. It would be highly improper, in our opinion, to extend the system to political offenders, more especially previous to conviction ; and its application to juvenile offenders requires great discrimination.

Another mode of reformatory discipline is to be found in the system of Colonies Agricoles, such as that at Mettray, to which reference has already been made in this Review.¹ As

¹ See 5 L. R. 382. See also Mr. M. D. Hill's valuable Report to the Law Amendment Society, on Secondary Punishments. This has been reprinted in the Appendix to the Lords' Reports on Transportation (1847).

to this system, the Committee of the Lords say, "It is remarkable that those who have actual intercourse with convicts, are they who feel the least sanguine as to the deterring or exemplary effect of penal infliction, and who lean more to make trial of punishment as affording the means of reformation. The experiment that has been tried at Stretton on Dunsmor, in Warwickshire, for above twenty-eight years; and similar experiments at Horn, near Hamburgh, and at Mettray in France; and eleven other establishments in imitation, during the last eight years, afford a highly gratifying view of the efficacy of reformatory discipline, especially upon young offenders." (*Second Report*, p. 8.)

There is yet a third mode, the Mark System, as originated by Captain Maconochie, and which has also been repeatedly described in our pages.¹ We rejoice to hear that the Government is about to give it a trial, under the immediate superintendence of Captain Maconochie himself. It is to be applied in directing the labour of convicts at Portland, and, we believe, in other places also.

"This system was very imperfectly tried on Norfolk Island. In particular, its marks had not there any authorised value relative to liberation; and several other serious imperfections existed. Yet its results are thus spoken of by a recent writer:—'Captain Maconochie did more for the reformation of these unhappy wretches, and in amelioration of their physical circumstances, than the most sanguine practical mind could beforehand have ventured even to hope. . . . My knowledge of the convict's character warrants my saying expressly that his views offer the only approximation that has ever yet been made to a correct penal theory.'²

"The Rev. Mr. Naylor, also, now clergyman at Carcow, New South Wales, but who was above four years chaplain on Norfolk Island, thus reports of the proceedings there in a letter dated 3rd February, 1847: 'I owe to Captain Maconochie, and his *doings*, the full conviction of the *invincible truthfulness* of his system of managing and improving criminals. In thinking over all our Norfolk Island experience, I do not mean to say that some errors were not committed; but I am sure that infinite good was done.

¹ See 5 L. R. 179. 380.

² Settlers and Convicts, or Recollections of Sixteen Years in Australia, pp. 412-413,

As pastor of the Island, and for two years a magistrate, I can prove that at no period was there so little crime—or anything like the tone of improved feeling which characterised the period of his residence there; and I am willing to stake all my credit upon the assertion that, if he has a fair field and fair play his cause will be triumphantly established. I never meet a prisoner who does not confirm my conviction of the improving tendencies of the efforts he made.'

"The consideration of this system has no connection with questions respecting the relative merits of Separate, Silent, or other Imprisonment. Its views are beside and beyond theirs. They regard *forms of detention*:—but it contemplates the spirit of discipline to be enforced in any. Whatever is distinctive in them looks to the more or less perfect protection of the mind, while in prison, against external injury: but this seeks to give it an active movement to good in itself, which shall make it proof against such injury however it may approach. They reason regarding the vice which may best hold the pebble while under manipulation;—this, regarding the principles on which the artist may best engrave and polish it.

"Being thus different in their objects there is no opposition between them. Men may be kept in separation or silence with, or without, the Mark System; and they may be kept under the Mark System when either in separation, silence, or ordinary congregation. It directly appeals to the mind, and aspires to direct, and strengthen, and make it sufficient to itself, whatever the external circumstances in which it may be placed: they seek to regulate these circumstances, and by rendering them indispensable to the production of the immediately desired effect, it may be feared often make the patient even more dependent on social position than he was before. Such is the familiar result, in the management of men, of extreme reliance being placed on *material* aids; and the only system of discipline yet proposed, which distinctly contemplates, and provides against such source of moral injury, is the one here advocated. *It seeks to make men, not puppets*,—to form prudent and self-regulated, not merely submissive minds;—and to this feature in its character, it may be observed by the way, beyond all question it owed almost exclusively its comparative success, in the most unfavourable circumstances, on Norfolk Island. The worst men there after a time lent themselves to arrangements which, however immediately irksome, had this for their avowed object, and by their operation advanced them in their own powers and self-respect; while the best, under

other systems, in the mere instinct of self-defence, resist or evade such as aim exclusively at subduing and coercing them. And whichever principles of action are thus developed, we may rely on it, will always be found progressive. Manly and virtuous impulses, once brought into action, will gradually imbue the whole character; as violent, sneaking, or deceptive ones equally will, if they, on the other hand, are made active. And the whole virtues of the free man, or the whole vices of the slave, are thus in the hands of the criminal legislator, as he may choose the philosophy, persuasive or coercive, by which to be guided.

“Directly mental then, yet essentially practical, in its operation, independent in its scope, character, and action, comparatively indifferent to external circumstances, *natural* in its apparatus, in harmony with the impulses and aspirations of mankind, not in direct opposition to them, and winning and improving, almost of necessity, as it proceeds, the Mark System seems eminently calculated to become a National System, and to reverse those results of existing Secondary Punishment which exhibit themselves in every civilised country alike, and are a reproach to the moral science of our day. It may be introduced into any gaol, without any preliminary expense;—and though a good prison must always be better than a bad one, yet the beneficial effects of the system will be most manifest in the *worst*, on the principle that the results of moral influence will be most evident and unquestionable where physical restraints are the fewest and weakest. Further, two sources of economy especially belong to it. 1. Being calculated to produce *voluntary* efforts, little comparative superintendence will be required to make it effective. 2. Wherever a scope of useful or profitable employment can be found, the labour of prisoners will be made much more productive by it, and the administration of punishment, instead of a burthen, may become a source of capital and revenue to the country. The completion of useful public works, by prisoners under this system, is especially calculated to bring about such a result.” [We are indebted for this statement to Captain Maconochie.]

We cannot close this short article without expressing the pleasure we have received at the establishment of the Congrès Pénitentiaire, which has now concluded its second meeting. It is not only that we see in its ranks many eminent names among the scientific jurists of Europe, and many persons distinguished by judicial rank and high office, but we confess that our chief gratification is in finding men coming from all

parts of Europe to meet, to settle, to discuss peacefully the true principles which should regulate the administration of the law in one of its most important branches. The meetings are not so important in what is actually done at them, as the inquiries and investigations which arise out of them. They stir the minds of men; they set persons thinking on subjects which otherwise would never occur to them. From the most unexpected quarters light and truth are thus elicited. We liked, too, the feeling of brotherhood which was displayed; for the time all were citizens of the world; a common cause, a common language (in which liberties were certainly taken by some of our countrymen), a common table; all talked, dined, danced together for three days, and the pain of parting was relieved by the hope of meeting again next year. If we had a regret, it was that we did not see some of our own judges there.

ART. IX. — CONVEYANCING REFORM — INSURANCE OF TITLES.

THE Committee of the Law of Property, appointed and established by the Society for the Amendment of the Law, commenced its meetings on the 31st day of May 1844, and they have been continued (with the exception of vacations) down to the present time. It has usually had the advantage of the services of Mr. Duckworth, as chairman, who brought to the inquiry not only great learning and candour, but the experience which he had acquired as one of the Real Property Commissioners. This Committee had also this great practical advantage, that, although it was attended constantly by certain members, it had also the occasional attendance of many others, who could be thus consulted and infuse from time to time life and vigour into its proceedings. This learned body then set themselves resolutely to work, to inquire into the real defects of our law and practice relating to real property, and to devise remedies. We have already brought before our readers some of its Reports; and we may

particularly mention the Reports on Shortening Deeds¹ (the present results of which are the acts 8 & 9 Vict. c. 119. & 124.), on Outstanding Terms² (which led to the Act 8 & 9 Vict. c. 112.), the first and second Reports on General Registry³, and the Report on a General Map, or Survey of Lands.⁴ We shall now lay before our readers the Report on Insurance of Titles, which, taken in connection with a Registry, is certainly not the least important of the series. It is now admitted by most candid practitioners, that great benefit will result from the establishment of an effectual register of titles, grounded on a map. The difficulty is the commencement of such a system. How shall the starting-point be gained? In this view the subject of insurance of titles, as explained in the Report, is worthy of the utmost consideration. Another point is this. Admitting that there would be great difficulty in calculating the proper premium to be paid in all defective titles, is it not obvious that the plan would apply to all titles now considered *good*? *In all that class of titles, for instance, in which an existing insurance society would lend its own money on mortgage, is it not clear that it might insure the repayment of another person's money?* If this be so, the benefit at the starting of a register would be very great, as it would enable the existing generation to enjoy its complete benefit. The mode in which this plan is to be connected with a register is explained at the end of the Report.

COMMITTEE ON THE LAW OF PROPERTY.

The following reference was made to this Committee:

To consider whether, in connection with a general register, the principle of insurance of titles might not be introduced.

REPORT.

Experience has established that the opinion of a competent conveyancer as to the safety of a title is a satisfactory

¹ 2 L. R. 407.

² 2 L. R. 183.

³ 4 L. R. 336, 351.

⁴ 5 L. R. 385.

test of its validity. Lands are purchased, and money is advanced on the faith of these opinions; and it is very rarely indeed that the title to the lands is afterwards invalidated. But, notwithstanding that a satisfactory opinion has been given as to a title, it is thought necessary on every new dealing with the land that the title should undergo a fresh investigation. The question then arises, whether the repetition of investigation extending over the same ground is necessary; whether one investigation of title may not be sufficient; and whether, up to the time at which such investigation takes place, the title may not be insured, the only risk being, where the title is pronounced a good one, the fallibility of that opinion.

This principle of insurance might, it is conceived, be extended to three kinds of title.

1. Those titles which now pass current as approved titles both at law and equity;

2. Titles which, although considered good holding titles, are technically unmarketable; and,

3. Titles subject to some specific defect, greater or less in extent according to the particular circumstances of the case.

In the first class of titles here alluded to, and to a great extent in the other two classes, the object of the proposed insurance would be to have one careful investigation, which should not be repeated; to render all future investigation, down to a certain point, unnecessary; and, in all after dealings with the property, to take up the examination from the period at which it was so examined and ascertained by counsel to be a good title. According to the present practice, the expense of investigating the title is incurred in every case alike, not only over and over again, but as well in the good titles as in the bad. The present expense in regard to titles, says Sir Edward Sugden, in the last edition of his work on Vendors, "is, in forty-nine cases out of fifty, superfluous; but, as every one may be in danger, all are guarded against it. This precaution has very much increased within the last thirty years, but not from any increased danger."¹

¹ Sugd. Vend. 936, Edit. 11. (1846.)

In applying the principle of insurance to this class of titles, the terms for insuring against the possibility of eviction should not be high, especially as every day that elapsed after the transaction would diminish the risk, until it vanished altogether, so soon as a good title under the present Statute of Limitations was gained by the purchaser or mortgagee, and all persons claiming under him.

Let us, then, suppose, that either the state or a public company is willing to undertake this risk (and doubtless, if it were not a great one, competitors to any amount, as in underwriting, would enter into the field); and if a public company were adopted, it would seem more for the interest of the public to distribute this business among such of the principal insurance offices already established as were willing to undertake it. In doing this, we point out that mode which appears to us to be the best on the whole. But if the general principle is once established, the mode of carrying it into practice might be safely left to the parties undertaking the risk. We will next shortly consider the steps that might be taken in the matter, supposing a public office to undertake this risk. A person wishing to sell, mortgage, or otherwise incumber his property, would first have to make out his title to the satisfaction of the insurer. This would be done according to the usual practice of an insurance office about to lend money on mortgage. The title would be sent to a conveyancer, to be selected by the office. If this conveyancer gave an opinion that the title might be accepted, a certificate to that effect would be given by the office, and it would be then dealt with, without any inquiry as to the title previous to that date. It would circulate as land, the title to which was insured up to that time. The purchaser of such property would be relieved from the present expense and delay attending the investigation of that portion of the title which was so insured, and this insurance might be continued from time to time. If the title were a good one, of course he would have no further difficulty; if it turned out that his was the black sheep in the flock, and he was evicted, he would come upon the insurance fund; and thus the office, or, in fact, all

the persons who had good titles, would pay for the one that had thus turned out bad. The scale of premiums must be a matter of regulation proportionable to the risk incurred; but your Committee believe, that when it is considered how rarely eviction now takes place, and how many advantages are enjoyed by the existing holder of land in retaining possession, the premium should not be a high one.

The expense of the investigation of the title would fall in the first instance on the vendor (although eventually the profits of the office might enable it to share such expenses); but as the purchaser and all claiming after him would be entirely relieved from such expense, it is reasonable to suppose that he would be willing to pay a larger price, and that as the class of purchasers would be more numerous the vendor would thus get back his expenses and probably something more in the increased value of his property, while the purchaser would be able to render the lands much more easily available on a future sale or mortgage.

The plan would also much facilitate purchases by trustees under a direction to invest in land, in which case the smallest objection to the title usually prevents the purchase being completed. It would also be particularly advantageous in all those cases where, from the vendors being trustees or from some other cause, no covenants for title are entered into.

We have hitherto supposed that the title was a marketable title, but let us now consider the second and third classes of titles. Let us suppose that the title was pronounced by the conveyancer who was consulted not to be a marketable title, but a good holding title, or to have some defect more or less substantial, the office might still allow the land to be sold on being properly indemnified by the vendor against the greater risk incurred, whatever that might be. That a great number of titles are safe to hold, though technically unmarketable, is certainly true. Master Senior, in his evidence before the Lords' Committee of 1846, on the Burdens of Land says¹, "I think that there is little of really defective title. Titles almost all seem to be safe for holding, but the difficulty is to

¹ Page 458.

transfer them. There are many objections to title as to marketableness, few as to safety." The same witness goes on to say¹, "I believe that this is the only civilised country requiring a sixty years' title, or even forty years; I believe that in almost every country but this the transfer of property is effected in the books of a notary or a registrar, or some public officer, and that you require only the title of the person who sells." It is submitted, then, that the principle of insurance would also apply to this class of titles, and would be found highly beneficial.

A few general remarks remain to be added.

If the purchaser in any case where the land was insured were desirous of improving his property, he might, if he thought proper (if such improvements were not protected by the well-known rule of equity as to this), secure the repayment of these advances by additional premiums, as is now done when extra risks are incurred on life, fire, and marine insurance.

It is further to be observed, that the risk of bad title is one which is now actually incurred by all offices advancing money on land, and that in fact in many cases the office might be its own insurer.

But it may be said, that the office would be liable to be defrauded, that bad titles would be concocted, with the view of obtaining the value of the land insured, and that collusion would take place between the vendor and purchaser. This Committee is, however, of opinion that the proposed system of insurance might be as effectually guarded against fraud as other ordinary dealings which are now profitably carried on. Some fraud might exist, but not in a sufficient proportion to countervail the great benefits which would be obtained by the system. Indeed, frauds of this nature might now be committed if it were easy to commit them in cases where money was lent by an office on the security of lands. Still it would be proper to take all precautions against fraud. In case of any attempt to recover any land, the title to which had been insured, the office might have the option given it to defend

¹ Page 459.

the action. It would not be unreasonable further to protect the office by enacting severe penalties against frauds, either actual or attempted.

It has also been urged that, in many cases the purchaser would only be partially indemnified by getting back his purchase-money; that he makes his purchase from peculiar motives, and that the very piece of land which he buys is what he wishes, and not its mere money value. But when it is remembered that under the present system he may not only lose the land which he has purchased, but also the money which he paid for it without any redress, this Committee consider that there is not much in this objection. And it is to be observed that the objection is totally inapplicable to all loans on land by way of mortgage or otherwise, and in these cases the repayment of the money lent would be a complete indemnity.

It has also been objected that a subsequent purchaser might not be disposed to take a title guaranteed by the insurance office, but might insist on having the deeds. But this might always be guarded against by the conditions of sale.

It has also been urged that the powers possessed by a company of this nature, might be used oppressively as against private individuals, but it should be remembered that similar powers are already possessed by all railway companies, to a less or a greater extent according to the quantity of land which they have acquired, and such powers are also possessed by many existing insurance companies, by which large sums are constantly invested on the security of land.

On the whole, this Committee, giving due weight to all these objections, are of opinion that the plan which has been laid before them for the insurance of titles to real property, is well deserving of serious consideration as the suggestion of a principle, and that it seems capable of being employed, either in connection with a registry or without it. But if a registry were established, it would probably greatly facilitate it. If the Committee are right in supposing that our retrospective titles may be worn out and abolished within a period of about twenty years, as is proposed in the second Report on Registry,

a well-arranged system of insurance, by throwing upon a public body the burden of all past defects and complications, and guaranteeing and establishing the registered title during its periods of transition, might make the benefit of the register immediate: or, if our retrospective titles be an evil, necessarily consequent on the existing state of English society, perhaps an insurance of the title at periodical intervals might alleviate the evil by shortening the inquiry. All the recent labours of this Committee have been directed towards the abolition, as far as possible, of retrospective deduction of title, and they are of opinion that the principle of insurance, judiciously carried out, may afford important aid towards the accomplishment of this object.

In carrying out a proper plan of insurance, it is quite certain that legislative assistance would be necessary; but this aid, it is considered, would not be withheld under proper restrictions.

The plan proposed would set free and bring into the market a great mass of property which might be immediately dealt with either for sale or mortgage, and a fund to provide against loss would thus speedily be raised. Neither should it be forgotten that the plan particularly facilitates the transfer of small freeholds which, under the present system, are nearly unmarketable, if a rigid investigation of title takes place.¹

It is proposed to connect the plan detailed in the above Report, with a General Registry, in the following way:—

A person, wishing to deal with his land, would apply to the Insurance Company (assuming it to be established) to insure his title. His deeds would be examined in the way now done when a company lends money on mortgage. If the title was insured by the office, the deeds would be then deposited, and the owner would take a certificate to that effect to the Register Office, and the lands would be put on the Register as being an insured title, thus constituting a root or foundation of the future title. The title, which would

¹ The Report ends here.

be thus insured, would be, in many cases, 1. A marketable title: but it might happen that the title was not a marketable title, but might be; 2. A good holding title: or it might be; 3. A title, more or less defective.

Let it be next assumed that Sir Edward Sugden's opinion, referred to in the Report, is correct, and that one title only in fifty is bad. A fund of two *per cent.* would meet the loss which might arise; but it does not follow that such loss would occur, because the title, although really bad, might not be discovered to be so; or, if discovered, might not be proved to be bad. But, in order to afford perfect security, it might be necessary to raise this fund. It is proposed, then, to raise it in this way: that marketable titles, as well as all others, should pay a small *per centage* on the purchase or mortgage money, to be paid by the purchaser or mortgagee, in lieu of the expenses now incurred in the investigation of title. That the titles, not marketable, but good holding titles, should pay a small *further* sum, to be paid by the *vendor* or *mortgagor*; that where a title has a positive defect or flaw, this should be insured against by a higher rate, to be paid by the vendor; and that, when this liability was imminent, the office might be further protected by some special indemnity or deposit of the purchase or mortgage money.

It being admitted that a great proportion of titles are good *holding* titles, might not a general system of insurance, ranged into classes of this nature, be carried on with profit, and the premiums payable be substituted for the large expense now payable in dealing with real property; and might not one good examination of the title be thus made to serve for all future dealings with it?

So far as the liability of the indemnity fund was concerned, all that would be necessary to obtain would be a good holding title; and the general opinion of the profession is, that almost all titles are of this nature; that is, 99 out of every 100. Perhaps the best mode of ascertaining the accuracy of this opinion would be, to find out, so far as possible, how many evictions have taken place in the experience of large professional offices, or in how many cases money lent by insurance offices has been lost in a series of years.

Risks relating to title, as the birth of issue, &c., are already insured against by some insurance offices. The Protector, the Alfred, the Family Endowment, and other offices, take these risks. Is there anything in the general nature of this business which is incompatible with the principle of insurance; and might it not be safely commenced, as life assurances and other insurances were commenced in the first instance, by leaving a wide margin for losses? It is believed if five per cent., instead of two per cent., were raised, it would be less than the sum now spent in investigation of titles and other expenses attending the dealing with real property, exclusive of stamps.

ART. X.—REPUDIATION.—MEASURES FOR
IRELAND.

Observations upon certain Evils arising out of the present state of the Laws of Real Property in Ireland, and Suggestions for remedying the same. Dublin, 1847.

It has been one of the first objects of all civilised legislation to establish some law regulating the rights of debtor and creditor, as between individuals, and they are now ascertained with tolerable clearness even in this country. True it is that the debtor has long fought the good fight; step by step has he receded, keeping all he could, and giving up his property bit by bit and with great lamentation; but the creditor has become more and more powerful, and now (setting all disputed points for the present aside), lands, goods, money, and person, are all to be obtained. All that the debtor has, all that he may have, is seized upon by the law, and nothing remains to cover his nakedness but the rag of privilege; and this is secured only to a very limited number of persons, to be torn away by the first breeze which blows in that direction. This victory of right over might has been finally

achieved within the last twenty-five years—the law reform era. The pleasures of insolvency; the borrowing with no intention of repayment; the obtaining goods, whether on a small or a large scale, were enjoyed until lately with much greater gusto and with far more impunity; but now the race of Charles Surfaces is becoming nearly extinct, the non-payment of one's tailor's bill has ceased to be a joke. The rule—"Owe no man anything," must now be submitted to as a matter of practical necessity. So far, then, as individuals are concerned, the hands of the law have been greatly strengthened; and, if a man will not pay his debts he must take Edie Ochiltree's advice, and must flee for it.¹

But, while the law has become more stringent in wringing from private debtors their property to the last farthing, the public debtor is becoming more and more lax in his notions as to the re-payment of monies advanced to him. He calls up a new word to justify his act; he declares that he will not pay, or, to use his own word, he "repudiates." It is indeed true, that, in all cases of private right, the divine law and the private law of every civilised country are on all fours. The old Roman procedure, as we know, enforced this by cutting up the debtor's body into as many pieces as there were creditors, and giving each a slice proportional to his debt; and our former barbarous law of arrest was nearly as unmerciful. All that we now do, is to take away the property of the bankrupt and punish him only for fraud or concealment. There is no doubt as to this. But our Acts of Parliament do not extend to other nations. Let us look, then, to the writers² on international law and see what they say on this subject, and we shall see that the non-payment of a debt, lawfully contracted, has always been considered one of the

¹ "Now, were I in a scrape," said Hector, "I would beat a march, and leave the king and the creditors to settle it among themselves, before they came to extremities."

"So wad I," said Edie; "I wad gie them leg-bail to a certainty."—*Antiquary*, vol. iii.

² Some of these authorities were cited by Lord G. Bentinck in his speech of the 6th of July

greatest crimes which a nation can commit, and a lawful cause of war.

First, then, the non-payment of a debt is clearly within the famous declaration of Camillus when leading his soldiers against the Gauls, in which he concisely set forth all the subjects on which war can be grounded or justified, viz. all things that might be lawfully defended, re-demanded, and revenged, — *Omnia quæ defendi, REPETI, et ulcisci, fas est.*¹

Next, Grotius says², “Now, as many sources as there are of judicial actions, so many causes may there be of war;” and then, in continuation, “Most men assign three just causes of war, — defence, *the recovery of what is our own*, and punishment.” And he cites Plato as saying, “That war is not only undertaken when one is insulted or plundered, but also when imposed upon or treated in a fraudulent manner;” and Seneca, “It is a very equitable saying, and founded on the law of nations, — Pay what you owe;” and Sallust, “I demand my own by the law of nations;” and Curtius, “The first cause of a just war is an injury which, though not done, yet threatens our persons or *our estates*.”

Puffendorf³ is equally clear to the same effect, “The cause of just war may be reduced to these three heads: — 1st. To defend ourselves and properties against others who design to do us harm, either by assaulting our persons, or taking away or ruining our estates. 2dly. To assert our rights when others, who are justly obliged, refuse to pay them to us; and, lastly, to recover satisfaction for damages we have injuriously sustained, and to force the person who did the injury to give security for his good behaviour for the future.”

Vattel⁴ follows these writers, and says, “We may distinctly point out, as objects of a lawful war, the three following: — 1st. To recover what belongs or is due to us. 2dly. To provide for our future safety by punishing the aggressor or offender. 3dly. To defend ourselves, or to protect ourselves from injury, by repelling unjust violence.”

We might cite many other authorities to the same effect,

¹ Livy, lib. i. cap. 32. § 11.

² Book viii. cap. 6. § 4.

³ Book ii. §§ 1, 2, 3.

⁴ Book iii, cap 13

but we feel that we should be labouring to prove what no one at all acquainted with the subject denies.

The non-payment of a debt, lawfully contracted by a state, is then a just cause of war with that state. But here several questions arise; supposing the contract to be made by one state with another for the loan of a sum of money, there can be no doubt as to the right of war on its non-payment, at the stipulated period, of principal and interest; and the same rule applies to a case when a state guarantees the payment of principal or interest for the benefit of another state, and has to act on its guarantee. The loan that this country guaranteed to Greece, in conjunction with France and Russia, comes within this latter rule. The present Government has very recently insisted on the provisions of the treaty being observed, as to the payment of interest, and the demand has been complied with.

But the more usual case is this:—A state, wishing to borrow money, contracts a loan in this country; and English subjects lend their money on the good faith and credit of the contracting state. We apprehend that this case is also within the authorities we have cited, and that, if the interest is not duly paid, a case of war arises; nor can the amount of the debt make any difference. If Tom Thumb were an English, instead of being an American citizen, all the personal rights of all the inhabitants of the British empire are represented in his person, and any infringement of them must be vindicated by our Government. In like manner, if the smallest coin of the realm were justly due to a British subject from a foreign state, which refused to pay, the rule regulating its non-payment applies and might be acted on. But it is only when a considerable sum is owing that it is worth the while of a state to be dishonest. When the demand is a small one, the plea of bankruptcy is not filed.

But, although the right to go to war may be clear, it does not always follow that it is expedient to act on it. This right, in cases of non-payment, as modified by expediency, has been very recently stated by Lord Palmerston, with his usual clearness and precision, on the motion of Lord George Bentinck, on behalf of the Spanish bond-holders on the 6th of July last:—

"A distinction has always been drawn," said his lordship, "between the ordinary transactions of British subjects with the subjects of other countries, and the transactions of British subjects with the Governments of other countries. When a British subject, engaged in trade with the subjects of a foreign country, sustains a loss, his first application is to the laws of that country for redress. If those laws are not properly administered in his case, then the British Government steps in and demands, either that the law shall be properly dealt out, or that redress shall be given by the Government of that state. It is to the advantage of this country to encourage commercial dealings with foreign countries, but I do not know that it is to the advantage of this country to give great encouragement to British subjects to invest their capital in loans to foreign countries. * * * If the principle were established as a guide to the practice of British subjects, that the payment of all loans should be conferred by the arms of England, it would place the British nation in the situation of being always liable to be involved in serious disputes with foreign Governments, upon matters with regard to which the British Government of the day might have had no opportunity of being consulted, or of giving any opinion one way or other. If British subjects came to the Government of this country and said, 'We are disposed to deal with a foreign state, will you compel that state to make good its engagements should it fail in doing so?' Then, if the British Government were to say, in reply, 'We will give the undertaking you require;' and if, afterwards, the foreign state should fail to fulfil its engagements, there could be, undoubtedly, no question as to the course which the British Government should take. That question has been more than once put to the Government, and my replies always were, 'If you choose to advance your money, you do it at your own risk.' Still," said his lordship, "I do not deny the doctrine of the noble lord setting aside the question of expediency, putting out of view the question whether it is politic or not for the British Government to undertake such an obligation." (*Hansard, N. S. vol. xciii. p. 1300.*)

This appears to us to be a correct statement of the law of nations on this point. It is to be observed, however, that some new understanding on the subject may become advisable. If repudiation proceeds much further, it will be necessary for all civilised states to re-adjust the rules on this subject which shall govern them. We have recently heard much of con-

gresses of nations, not, as in former times, of monarchs, but of the people of different states; not of the governors, but of the governed, — who have met, peaceably, to discuss subjects of interest to all, — who have thus established free trade, at all events in ideas, in opinions; these can enter into every country without a passport, and fairly pass over the heads of the custom-house officer. Well, a congress of nations must shortly be summoned to discuss when a country may properly declare itself bankrupt; what are the rights of all parties concerned; before what commissioners a fiat may be proceeded with; what lord chancellor shall sign it, and, perhaps, the most important point of all, who shall be the official assignee. A nation may have the same right as an individual to go into the Gazette, but then it must be on similar conditions. It must not judge of its own power to pay, or regulate the time of repayment; these are questions as to which most debtors and creditors will widely differ. It must surrender its property, — it must submit to its fate, — it must put on sackcloth and spread ashes on its head, and wait patiently until it gets its certificate. It cannot enjoy the rights of insolvency without submitting to its inconveniences. We must extend the law of bankruptcy, or, at all events, the law of mortgage, to states and nations. A new chapter of international law must be written. Its title will run, “Of State Debts, and the Peaceable Modes of Recovering them.” The rules which relate to the forcible modes of recovery need not be re-written. They are fully understood, and have occasionally been resorted to. A ship of the line, with a couple of frigates, have been found sometimes as effectual as a bailiff and his follower. A bombardment is even a more summary and complete remedy than possession taken by a messenger. It has before now produced a good round sum in half an hour’s time. But we speak not of process of this nature, we are lawyers and we cannot endure remedies which take the matter out of our hands. All that we say is, “leave the offending nation to us, and see if he gets very easily out of our clutches.”

So far the government of this country has been very rarely

called on to interfere in matters of this nature. But it has done so.

In 1763, a loan was made to the Emperor of 80,000*l.*, and was advanced on the security of Silesia. Silesia was afterwards transferred to Prussia, and the king refused to pay the debt; a remonstrance was however made, which was listened to by the King of Prussia, and the debt was paid. In 1840, Portugal was compelled to pay the debt due to the British legion, and to the British auxiliary force in Portugal. The Greek loan in the present year we have already mentioned.

The only case in which we remember England to have interfered to compel the payment of a debt, lent by the individual public to a foreign state, was that of the American states of Venezuela and New Grenada, in 1840. Lord Palmerston then said distinctly in his despatch on the subject:—

“It is plain that so much of the public revenues of the states of Columbia, as is equal to the interest of their debt to their creditors, does not in fact belong to those states, but has been virtually alienated by them by the contract under which the loan was raised; therefore, those states are defrauding the British creditor, by applying to the public service of the Columbian states, sums which in fact belong to the British creditor. The interest due to the British creditors should be deducted from the gross revenues of the states, and the residue only is the real revenue those states have any right to apply to their own uses.”

This is quite a legal view of the case, and would serve as a neat precedent of a letter to a private mortgagee in arrear.

So far, then, as concerns foreign countries. As to them it is a matter of expediency. But as representing this country, Lord Palmerston did not hesitate in the late debate to admit the right to its fullest extent, even as to loans contracted by a foreign government without the sanction of the British government; and, indeed, he afterwards hinted, in tolerably strong terms, that the patience of this country might be exhausted, and that it might be necessary to act on our strict rights.

Nor is this unimportant. Spain has long been in an insolvent state, so far as the national creditor is concerned. Portugal has (it is true, with the apparent consent of the creditor) tampered with her debt, and reduced her liability.

Greece has entirely got rid of part of hers, and would willingly shake off the residue. Thus do affairs stand in the old world. But in the other hemisphere things are far worse. Most of the South American states are either intermittent in their payments of interest, or altogether insolvent. There are, however, some honourable exceptions. But, alas, it is too notorious, that some of the most thriving states of North America are to be added to the list of insolvents; of which we are satisfied every respectable American citizen is most heartily ashamed, and the effects of which are now felt in the carrying on of a lingering and almost discreditable war. On this every thing has been said that the subject admitted, and an American citizen has recently told us what is thought about it abroad. Mrs. Butler, in her recent interesting book on Italy, speaking in that character, records with shame the opinion entertained in that country of the gross fraud committed by those states on the British public; and we are satisfied that this is the general sentiment of Europe.¹

This, then, is the state of things with respect to foreign countries, and as to them we need not say one word more. But this doctrine is beginning to spread to our own shores, for it is the curse attendant on an evil principle, that once started no one can tell in what shape it will next appear. Repudiation, which had begun (to use a vulgar phrase) to sing very small in America, has appeared in the form of a

¹ It is a well-known rule of international law, repeatedly acted on, that, in time of war, debts due from citizens of the belligerent states may be confiscated. An eminent American writer on this subject, says, "In respect of debts due to an enemy previously to the commencement of hostilities, the law of Great Britain pursues a policy of a wiser character. A maritime power, which has an overwhelming naval superiority, may have an interest, or may suppose it has an interest, in asserting the right of confiscating enemy's property seized before an actual declaration of war; but a nation which, by the extent of its capital, must generally be the creditor of every other continental country, can certainly have no interest in confiscating debts due to an enemy, seeing that enemy might in almost every instance retaliate with much more injurious effect. *Such, too, is the law and practice of the United States. The debts due by American citizens to British subjects before the war of the Revolution, and not actually confiscated, were judicially considered as revived, together with the right to sue for recovery on the restoration of peace between the two countries.*" (Wheaton, on International Law, vol. ii. p. 22.) Surely the case of public debts in time of peace is much stronger.

roaring lion in Ireland. Every thing is to be there repudiated that may suit the convenience of Irishmen. Counties, parishes, and individuals, are to use the sponge à *discretion* ; and this has already become the topic of daily articles in foreign journals, and the organ of the French government in particular, traces with visible satisfaction the progress of the disorder that threatens us.

“ En attendant la tempête grandit à l’horizon, l’esprit de résistance et de révolte descend d’échelle en échelle ; les propriétaires refusent de payer les taxes à l’état ; à leur tour les fermiers refusent de payer leurs rentes aux propriétaires. Ce double mouvement d’anarchie marche simultanément, et le désordre se propage comme un incendie.” (*Journal des Débats*, Sept. 26.¹)

This is the constant language made use of by a writer, only too accurately informed, although the statement is given with no little exultation.

Let us see, then, how this position has arisen. If the reader will look at the last volume of the Statute book, he will find that the fearful state of Ireland in this and the preceding year has there left its traces. One third of the whole relates to that part of the empire. Let us glance at some of these acts : —

By 10 Vict. c. 7., Relief Commissioners are appointed by the Lord Lieutenant, to superintend the execution of the act (which was for the temporary relief of destitute persons in Ireland) ; to appoint officers, and to pay salaries : and it was provided that no grant or loan should be made by the Treasury after the 1st of October, 1847 ; and further acts were passed, authorising further advances for similar purposes, 10 & 11 Vict. c. 55., 10 & 11 Vict. c. 99.

By stat. 10 & 11 Vict. c. 10., certain proceedings for the relief of distress in Ireland, *by the employment of the labouring poor*, are rendered valid, and those who acted in such proceedings are indemnified.

By stat. 10 & 11 Vict. c. 32., power to the Treasury is given

¹ See *La Revue des deux Mondes*, for Sept. 15, for articles to the same effect. We notice this because the effect made on Europe by these influential journals, as to our own financial state, may be considerable. The latest article in the *Journal des Débats* that we have seen is dated October 24.

to make advances to the Commissioners of Public Works in Ireland to the extent of 1,500,000*l.*; and a rent-charge of 6*l.* 10*s.* is to be charged for every 100*l.* advanced; proper powers being given for securing the repayment and redemption.

By 10 & 11 Vict. c. 87., the sum total expended under the recited acts (9 & 10 Vict. c. 107., 1 & 2 Vict. c. 56., 10 & 11 Vict. c. 10.) is to be ascertained by the Commissioners of Public Works, and to be certified to the Treasury, one moiety of such sums to be *a free grant from the Consolidated Fund*; the other moiety, with interest at the rate of 3 *per cent.* up to the 1st of March last, shall be ascertained, and shall be certified to the secretaries of grand juries; and the sum so certified is to be repaid by way of annuity of 12 *per cent.*, to be paid for ten years in twenty instalments. The grand jury at the spring assize, 1848, shall present for the moiety and interest to be paid by twenty instalments, as specified by the certificate. Any such instalment is to be raised and levied off the respective barony which had the benefit of the relief as poor rate, and powers of recovering the same are given.

By stat. 10 & 11 Vict. c. 73., power is given to the Treasury to charge the Consolidated Fund, and direct the issue there-out of 620,000*l.* for the construction of railways.

The Poor Law Guardians are now charged with a double duty. They have to levy a rate under the Poor Law Act of last session (10 & 11 Vict. c. 90.), and they have further to levy a rate under the Temporary Relief Act. But there is no disposition on the part of the Government to press hardly upon them, as appears by a letter, dated Downing Street, September 20, written by Mr. Charles Grey. In this, the Guardians of the Carrickmacross Union are informed, by the direction of Lord John Russell, that "By the orders of the Treasury no repayment under the Temporary Relief Act will be required during the present year, when the rates for the annual expenditure under the Poor Laws equal or exceed three shillings in the pound; when the rates fall short of that amount, it does not appear that a very ruinous burthen is imposed on the owners and occupiers of land. In such case, therefore, a rate of three shillings will have to be levied,

of which a portion will be applicable to the repayment of the sums advanced by the Treasury." Mr. Grey adds, that "In this country (England) the rates for the relief of the poor have, in periods of scarcity, frequently exceeded five and six shillings in the pound, and no portion of those rates had ever been paid by the people of Ireland."

It cannot be said, then, that there is any desire to drive the persons who should pay this money to extremities. But, surely, steps should be taken to enforce the payment, under certain conditions. Ireland must be plainly told, that what was advanced in good faith must be met in the like spirit. For what is required? Let it be remembered that millions were expended in subsisting the Irish in the past and present years, not a farthing of which is ever to be repaid. All that is asked is, that a portion of the money which was spent in permanent improvements, one half of the whole, be repaid by easy instalments, the remaining half being entirely abandoned.

If there were no other reason for enforcing the repayment of these monies, we should say, do this for the sake of the Irish themselves. If these sums are not repaid, where is the system of repudiation to end? We have shown that large further sums — more than two millions more — are to be lent to Ireland, to assist her in improving her land and in railways. But what security have we for repayment? If the sums already lent are repudiated, and the proper parties decline to take the steps necessary for enforcing the repayment, what security is there that the monies still in our Treasury will be more easily recovered? If sums lent on highways, roads, and bridges are thus to be wiped out, why not sums to be lent on railways? If debts, thus charged by the state on lands, are not to be repaid, why not debts so charged by individuals? If public debts, why not private mortgages? What security is there that common faith will be observed in the daily dealings between man and man? Where is the line to be drawn, and who is to draw it? Confidence becomes entirely shaken; and who suffers by this? Undoubtedly there would be much individual suffering to England, if every debt contracted to an Englishman were

successfully repudiated, and the nation would be considerably damnified if it was never to receive one penny that it advanced to Ireland in her hour of trouble ; but great as the injury would be to England, to Ireland it would return tenfold. Credit, good faith, honour, would cease to be associated with that country for centuries ; and, bad as her condition may be now, it would be as nothing to what would hereafter be suffered by her. For the sake of England, then, but far more for the sake of Ireland, these debts must be paid : with all gentleness and patience their recovery must be enforced. The hardship to individuals may be great ; but the welfare of the whole country is at stake, and must at all events be secured.

But, while we think it the duty of Government to act with firmness in carrying into effect the existing law, so far as it is possible to do so, on the other hand, the people, and more especially that part of the people on which these measures press most hardly — the landowners, have a right that they should have the most ample means given them of developing the resources at their command. Land is the great wealth of Ireland,— and here it is rich indeed ; and were the owners of land enabled to deal freely with it, we should soon see an end to their embarrassments. As it is, the state of their tenures positively ties their hands. They can neither improve their lands themselves, nor alienate them to others who are able to do so. Great as are the difficulties and expense in this country affecting the alienation of land, from the practice as to title and the length of deeds ; these evils are even greater in Ireland. Ireland, then, has a right to demand effectual means for rendering her resources available. Give her “free trade in land,” and you will enable her to feed and clothe her poor without the grinding operation of a poor law. Capital will thus be effectually introduced, and a new class of proprietors created. We are happy to see that the great body of Irish landowners are beginning to show that this is their opinion, and are calling upon Government to assist them. The demand for facilities for the alienation of land is fast increasing, and the most cautious begin now to admit that “something must be done.”

An attempt was made last session, by the Incumbered Estates Bill, to assist the landowner, but it failed. Not so much from its principle being wrong, as from its details being ill-conceived. We have already¹ had occasion to state our opinion as to this; and the event has justified it. The measure was found impracticable, and was withdrawn by the Government. Still we should regret its fate if a better measure is not produced.

But a bolder step is now wanted. The points to be attended to, are to secure a good title to future purchasers, as against all the world; and to connect this title with a registry which will allow for the future a safe and simple mode of transfer. We are apt, as well in Ireland as in this country, to associate delay and expense with all our ideas of dealings in land. But we have only to cross over to the Continent to find how far behindhand we are in this respect. Proud as we are of our institutions, and our great practical talents for business, our European neighbours laugh at us as the most miserable bunglers in all our dealings with respect to land. We shall probably enter into some details on some future occasion as to this, but at present we content ourselves with asserting as an undeniable truth that, in every civilised country in Europe, in some of course more so than others, land is readily available to the wants of its owner; which no one can pretend to say it is here.

In all other countries it may be absolutely disposed of, or mortgaged, cheaply, speedily, and safely. When we say cheaply, we speak only of professional charges. In some countries, as in Belgium, the Government stamp is much higher than here; but this being certain, and at a fixed rate, does not check alienation. In many of those countries land is used, not only as a permanent but as a temporary investment; and a *floating capital based on land, circulates throughout the country*, greatly to the advantage of all. If, then, these benefits exist in connection with land abroad, why may they not be extended to Ireland, and why may not her resources be developed in a similar manner? A good title once made, the very means which are used abroad may be imported into her

¹ 6 L. R. 665.

shores, and her existing machinery may be employed for carrying it into practice ; and, if this were done, we do not doubt that we should greatly improve on the foreign system, and, that our own registry would surpass our model. We have already shown how desirous the landowners of Ireland are of legislation of this nature.¹ We have seen it more recently expressed by a well informed writer, the title of whose pamphlet we have given at the head of this article.

“ The general employment of capital upon the surface, and under the surface, of the country, for industrial purposes, whether in the cultivation of the soil, in mining, or building, or manufactures, or in any other object of human industry, is admitted on all hands to be the first step towards bettering the condition of the people of Ireland. Every possible encouragement should be given to the investment of capital, and every means taken for its security in Ireland. It is only through such investments for industrial purposes, that steady, permanent employment can be given to the working people ; and such habits of regularity and industry be created amongst them, as are necessary for their own welfare, and the good of the state.

“ Sir Robert Peel paid a just tribute of praise to Lord G. Hill for the good he had worked in a district in Donegal, in which, in 1838, he had purchased an estate ; which district has improved in a few years to such a degree, as to form a remarkable example of what can be done by the owner of real property in Ireland, when he is unfettered by family settlements, debts, or charges ; and when, with the command of a moderate capital, he has the disposition to improve his property. In the case in question, unqualified and considerable benefits have accrued to all parties ; and the like benefits have resulted, in a greater or less degree, in all places where, by the free sale of land, an active and improving capitalist has found a suitable field for his exertions.

“ The parties from whom Lord G. Hill purchased the lands have been equally benefited. They had no capital wherewith to improve their lands, consequently, to them the lands were comparatively valueless ; and, though money might, perhaps, have been borrowed upon them in their waste condition, yet it better suited the interests of the owners to sell them. With the purchase-money they were enabled to employ themselves more suitably, and to put out their families in the world more advantageously than by holding the lands. The sale thereof was, therefore, a benefit to both parties.

¹ 5 L. R. 408.

"The writer of these observations could point out another similar case in the same district. About sixteen years ago a gentleman purchased a tract of wild land in that quarter. The people living upon it were of such lawless habits, that the previous owner would not have been safe from personal violence had he ventured amongst them. He had the power to sell his estate; and it was understood that his reason for selling it, was the dangerous character of the people. They had given a great deal of trouble to him and to the public authorities, and numerous infractions of the law had been committed by them during a long series of years. The property is a large tract, chiefly of mountain land. Though the purchaser, in this case, did not make an outlay to the same extent as did Lord G. Hill, nor was he able to give it as much attention as Lord G. Hill gave to his property, yet, by judicious arrangements, governed by the personal interests of all parties, he gradually introduced such order, and made such improvements, that this once lawless district is now as quiet as any parish in England. Such would be the result everywhere, if land could be conveniently bought, in suitable lots, with unquestionable titles. Ample capital would also be found for the purchase of any quantity of land ever likely to be brought into the market.

"The gentleman referred to, as the purchaser of the second estate, has kept an exact account of his outlay, the amount of which he has added to his original purchase-money, and he finds that, while he has improved the estate, and made the people in every way more comfortable in their circumstances, he has received seven per cent. for all his outlay. Family circumstances lately induced him to offer this property for sale, and an English gentleman has purchased it for rather more than double the price paid for it sixteen years ago, and double the outlay made upon it; so that the improver has received seven per cent. per annum for his money while employed upon the property, and double all his outlay on withdrawing it from the property.

"The individual who has purchased it at this greatly increased price (which is indeed only a fair price in its improved condition), being an enterprising Englishman, intends to expend double the amount of his purchase-money in further improvements upon the land.

"Thus two new proprietors of land, each with but a moderate command of capital, have been enabled, in a comparatively short period, to reform, civilise, and improve, an extensive tract of country; and to lay a foundation for further improvements, which will afford employment for every person upon the lands for a long

period of years. The advantages of these operations have branched out far and wide. A trade in grain, &c., the produce of reclaimed lands, which never before existed, has been opened with Glasgow; and from that city manufactured goods are imported in return. It is calculated that the public revenue gains an increase of a few hundred pounds a year, by the consumption of articles never before used by the people on these properties.

"From what have all these benefits and advantages proceeded? Simply from the mere act of a sale of land from one individual to another." (pp. 13—16.)

This is a very interesting and important statement. But how are similar benefits to be obtained?

"The only way to secure them permanently is to give every prudent facility for the transfer, by sale, of real property from man to man; by the adoption of a single, cheap, and secure system of transfer, in lieu of the present barbarous, unsafe, and expensive system; so that real property could be bought and sold in Ireland with as much freedom and security as other property.

"Free trade in corn being established, the free sale of land must eventually follow; for, until land can be bought and sold, and improved, and turned to the best uses, which the unrestricted employment of capital and skill thereon can devise, no permanent, substantial improvement of the condition of Ireland can be effected. In its present fetters, Ireland will not be able to compete with other purely agricultural countries in the British markets. It is said that there are only about 8,000 proprietors in fee (holding direct from the crown) in Ireland, including absentees and distressed proprietors. Rent attaches so much, as matter of course, to every house and plot of land, that Irishmen in general have no distinct idea of ownership of house or land without it. In the vast majority of cases the tenant in possession (whether of house or land) holds under such circumstances that he feels no inducement to improve his holding.

"It is true that large estates are sometimes in the market, but these are objects for large capitalists, who wish to derive *income* by investment of capital. But it is through the instrumentality of the small capitalists chiefly that the country can be civilised and improved. To sell an estate is usually an affair of great expense; and to purchase real property is one of great risk, owing to the defective state of the titles of a large portion of the landed property in Ireland.

“The number of persons who are entangled in law proceedings in regard to interests in land in Ireland would scarcely be credited. The substance of numerous families is thus eaten up by lawyers. The common saying of the people, viz. ‘a farthing’s worth of land and a pound’s worth of law,’ represents the popular idea on this subject. In a country where land is almost the only source of income and subsistence, the effect of such a state of things must be evident. *It has a tendency to demoralise men of all classes:* and I have no hesitation in expressing my belief, that such has been its effects in Ireland, to a far greater extent than most men would admit until they had carefully watched the operation of litigation in courts of law, in its insidious workings in undermining men’s honesty and right conduct.

“I know a gentleman who paid upwards of 600*l.* to lawyers this year, for the sale of an interest in a property which cost but 1,600*l.* Ten months were consumed in making out the writings, though purchaser and seller were most anxious to complete the business. I was acquainted with another gentleman who invested the savings of a whole life in land. The title thereof was afterwards disputed, and after years of litigation he lost his property; yet he was a prudent man, and took the usual precautions as to title in making the purchase. He died broken-hearted from his loss. A friend has informed me of a case in which the law expenses attendant upon obtaining 8,000*l.* upon mortgage, were estimated at nearly 3,000*l.*; and, therefore, the transaction was abandoned, the owner of the estate preferring to pay six per cent. rather than reduce his encumbrances to four on such terms.

“Such a state of affairs, as to real property, exists in Ireland, that a great majority of the parties most interested in the welfare of the country are powerless. No hope of better things for the future exists, until the Legislature shall, by giving every prudent facility for the sale of land, unlock the field for industry in Ireland.” (pp. 16—19.)

And at a subsequent page (p. 47.) it is said, “Though property in land is so much coveted by all classes of men in Ireland, yet a feeling has become general amongst the smaller capitalists that the dangers of the law are so great if they have any thing to do with land, *that numbers of men are deterred from embarking capital in it*, or in buildings, as matters now stand. The writer of these observations, and many other men with whom he is acquainted, would prefer

a very low rate of interest for money from the funds, or from any other good security, to a higher rate of interest from land in Ireland."

It is obviously, then, the interest of the Irish landowner to support measures which will give him the use of his own property. The present state of Ireland is thus described, and we see no exaggeration in the statement.

"Of the thirteen millions and a half sterling, which is said to be the total rental of Ireland, Lord Mountcashel estimates that much the larger portion is absorbed in debts. Large sums, besides, are withdrawn by absentees. The landlords are in such circumstances that they are unable to perform their duties, and are therefore powerless. So common is it, in many parts of Ireland, to set at nought the rights of property, that it has almost become a doubtful point, whether the landlord, or tenant, is eventually to possess the property. Paupers and beggars are spread over the whole surface of the country. A chronic insurrection always exists, in a greater or less degree. A force of 45,000 men is dispersed, in small bodies, in almost every parish in the kingdom, without whose support anarchy would, in numerous localities, instantly ensue. From the absence of fit persons, it is almost impossible to carry on the system of local, unpaid, civil government and administration, in the several counties, incident to the British constitution. Great evils result from this difficulty. In ordinary years, the revenue barely exceeds the expenditure, for Ireland, in its present state, cannot bear its fair proportion of taxation. At this moment, it is a heavy financial burden on the rest of the kingdom. In proportion to population, Ireland pays less to the State in taxation than any other country in Europe. Even the local constabulary, a force of 12,000 men, which has grown up with the growth of the disorders of Ireland, is paid out of the consolidated fund. Lord Lansdowne lately observed, most justly, that the country could only be improved through the instrumentality of the owners of property. But where are they? And what is their situation? In consequence of the disorders of the country for many years past, numerous families of proprietors have felt so unsafe or uncomfortable in Ireland, that they have settled on the Continent. In many instances their children have been born and brought up there; have acquired all the habits and ideas of foreigners, and an utter dislike for Ireland. Frenchmen, Italians, and Germans, as these young people really are, now own property; and more hereafter of the same description will derive rents from

Ireland. Forty-five thousand armed men replace those who, under a better system of landed property, should, and would, improve and tranquillize the country.

“If a minister of state should ever arise in our country with a mind like that of the great Prussian minister who, even in our day, has remodelled the whole system of tenure of landed property in that kingdom, what a vast field he would find in Ireland for his exertions; and what great services he might render to his sovereign and his country! There never was a time more favourable than the present for the successful issue of such exertions; when all men feel that there is that which is radically wrong in the whole system of real property in Ireland; and therefore Parliament and the nation, while this impression is strong upon them, would support every well-considered measure of reform that might place it in a more wholesome condition.” (pp. 20—22.)

We may say further, that in our opinion there never was a Parliament more likely to support measures for facilitating the transfer of land than that which is shortly to assemble. All parties are now willing to give the repeal of the Corn Laws a fair trial, but there is also a general wish that there should be every fair opportunity given to the landowner, by the employment of capital, of competing with foreigners. This opportunity cannot exist unless the transfer of land is free.

“Real property is not like other property; it involves duties to be done both by the state and the owner. Man is placed upon the earth to subdue it. The laws and institutions of every state should therefore give the greatest facilities for the profitable labour of man upon the earth. But the laws of real property, and the system built thereupon in Ireland, have hitherto condemned a large portion of its surface to remain a waste — the remainder to be half cultivated. They have produced miserable towns and buildings everywhere; while a half-starved population has been nursed up in comparative idleness, to become the dangerous tools and dupes of agitators — presenting to the world such an anomalous state of society as has perplexed all men, and which has long been a source of weakness and uneasiness to the British empire.

“It is earnestly hoped, that the day is not far distant when the whole subject will be thoroughly investigated by enlightened men,

under the authority of Government or Parliament. That there would be any serious difficulties in devising proper remedial measures, I cannot believe. All that is wanting is the resolution to face the evils, and not to be scared by existing cumbrous practices, precedents, and forms, which had their origin in the dark ages. In some of the continental states such affairs are managed shortly and safely, in public offices, at a trifling expense; because the governments of such states have no interest in creating difficulties, giving unnecessary work to their officers, or making costs against the parties. Various bit-by-bit reforms, it is true, have been attempted of late years in Ireland; but these, having been undertaken on no general, comprehensive plan, have not produced any sufficient results.

“Nothing is suggested in these observations that would injuriously affect any existing interest. On the contrary, every measure proposed would be as beneficial to the interests of the parties concerned in it, as to the state. *The measures would not create any expense whatever to the public.* The benefits expected from them would, it is true, not be immediate; but, though they might be gradual, they would not be altogether confined to the transactions that might take place, under the system proposed. A beneficial influence therefrom might be expected to effect great good in other quarters.

“The first practical step which is suggested is, a comprehensive inquiry into the evils, so imperfectly pointed out in these observations, with a view to such changes in the whole system as may best conduce to the future welfare of the kingdom.” (pp. 42, 43.)

We have made these large extracts from this pamphlet, because, although we have no personal knowledge of the writer, we are informed that he is a gentleman, living in Ireland, and practically acquainted with the subject on which he writes, of which, indeed, his work shows abundant evidence. We further know from communications which we have ourselves had with persons similarly placed, that there is at this moment abundance of capital only wanting employment in land, and many an Irishman ready to devote his best energies to its cultivation, if he can but be assured of its undisputed possession.

The writer considers that the reform must embrace the following points:—

"I. A system under which new titles from the crown shall be obtainable, gradually, as required; which titles shall be short, simple, unquestionable, and renewable upon transfer or death. Such titles would necessarily involve the gradual abolition of all existing forms which have their foundation in the feudal system.

"II. Titles of transfers, and all other business connected with real property (which can be transacted as mere matters of ordinary business, and which are not strictly legal business) to be performed by persons in establishments in the pay of Government, who shall have no interest in the amount of charges made for such business.

"III. Future loans, charges, &c., to be managed through a similar agency." (pp. 22, 23.)

These are, no doubt, the points to be attended to; and, while we are writing, an intelligent contemporary has shown us how they can be obtained.

"If Ireland is worse off in some respects than England, she has advantages over England in certain matters; which, although not all devised for that end, would all turn to great account in helping her out of the difficulties we have alluded to. We will mention some of them. 1st. She has an accurate territorial map, completed at great expense under the direction of the Ordnance; and she has thus the foundation of a short and simple system of conveying ready-made. 2d. A general registry of deeds has been long established; which, though defective in many respects, would be useful in various ways, and would supply a machinery available to a certain extent. 3d. Local Courts, having some jurisdiction over land, with a staff easily adapted to other dealings. 4th. Surveys, valuations, and statistical proceedings, most useful for the object in view.

"The 'real measure' for Ireland would then be — First, to establish a Tribunal to deal with all encumbered estates. The Lord Chancellor's bill of the last session attempted this; and the Government deserve praise for bringing in a measure, right in principle, though faulty, as we think, in detail. It allowed every owner of a freehold estate, or any incumbrancer on it, to proceed to a sale of the lands encumbered, by means of the Court of Chancery, and the Master was to make a title specifying what encumbrances should be barred. The purchaser was to pay the purchase-money into the Bank, and was to gain a title as against the persons who received the money. The great fault of the bill seems to

have been the adoption of the Court of Chancery in the first instance. That Court has no greater favour in Ireland than here. The emergency demands a more summary tribunal; one that will act on evidence which a man of common sense would take, but which a Master in Chancery would boggle at; a tribunal that would do substantial justice by cutting through knots instead of attempting to unravel them, leaving in the end no part of the fund to divide: the kind of Court that decided on the 20,000,000*l.* compensation fund for the slave-owners, in which all sorts of conflicting claims were raised, principally of the same kind which affect Irish titles; and which disposed of 43,564 cases, 4,136 with parties having opposing titles, with only two effective appeals against its decisions. This is the sort of tribunal imperatively called for, as peculiarly adapted to deal with Irish titles, where complete evidence is rarely to be had. Give *an appeal* to the Court of Chancery, if you please; but do not, to the other woes of the Irish landowner, add as a matter of course the miseries of the Masters' Office. If an expeditious working tribunal were appointed, empowered to make a title, to receive the purchase-money, and then to decide who is entitled to it, infinite good to all parties would be done. If the title was cleared, the full value of the land would be given, and all persons justly entitled would receive their own, or have it secured; the land would thus be set free; a new class of proprietors would arise; fresh capital, both Irish and English, would flow in; and the soil would be turned to its best uses.

"But this would only be one half of the measure: for, secondly, means must be taken to prevent the recurrence of the former evil. No sooner should any purchase be made under a sale so ordered, than it should be entered in a Register, and thus a *root of title* — that desideratum so longed for by all conveyancing reformers — would be secured; and, henceforth, all dealings with the land in question would be entered in this book, be easily seen, and easily comprehended. It is here that General Colby's map would be available. It is here that assistance from the Local Court might, if necessary, be obtained. It is here that the immense sums of money expended on Ireland in various ways, would be found not to have been spent in vain." (*Spectator*, Oct. 23.)

We sincerely trust that these statements will reach the proper quarter, and that means will be taken for giving Ireland the benefit of measures of this nature, in which not only Ireland, but England, has become so deeply interested.

SELECTION OF ADJUDGED POINTS

REPORTED SINCE 1ST AUGUST, 1847.

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- I. POINTS IN COMMON LAW, p. 185.
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COURTS.	REPORTERS.
Lord Chancellor - - -	5 Myl. & Craig. Part 2. 2 Phill. Part 2. 1 Coop. & Cott. Part 3. Law Journal. Parts 9 & 10 (1847).
V. C. Knight Bruce - - -	2 Coll. Part 4.
Queen's Bench - - -	7 Q. B. Rep. Parts 4 & 5.
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I. POINTS IN COMMON LAW.

1. Guarantee — Consideration. 2. Fraudulent Conveyance — Stat. 13 Eliz. c. 5. 3. Bankruptcy — Provable Debt — Unliquidated Damages. 4. Witness — Advocate — Practice. 5. Pleading — Lien — Certificated Conveyancer. 6. Partner's Authority — Warrant of Attorney. 7. Railway Committeemen — Consolidation of Actions. 8. Evidence — Sending Letter by Post. 9. Ejectment — Landlord and Tenant. 10. Attorney — Liability to Bailiff's Fees. 11. Railway Provisional Committeemen. 12. Evidence — Proof of former Felony. 13. Contract — Parol Evidence.

1. PRICE v. RICHARDSON, 15 Mees. & W. 539.

Guarantee — Consideration.

It is a settled rule that a guarantee must always show on the face of it a consideration either express or implied. In the present case the defendant signed a guarantee in these terms : — “ Mr. Price, I will see you paid for 5*l.* or 10*l.* worth of leather, on the 6th of December, for Thomas Lewis, shoemaker.” At the trial before the under-sheriff of an action upon this guarantee, the plaintiff had a verdict. But, as it was defective in the point above-mentioned,

the Court of Exchequer ordered a nonsuit to be entered. Parke, B.: "It is impossible to collect from the terms of this guarantee what was the real consideration for the defendant's promise. Three considerations might be suggested, and it would be mere conjecture which was the one intended by the parties. It is fully established, according to the rule laid down in *Wain v. Warlters*, (5 East, 10.), that the consideration ought to appear on the face of the instrument." Alderson, B.: "Here the declaration states the future supply of goods as the consideration; but that does not appear, either expressly or by necessary implication, on the face of the guarantee." Rolfe, B.: "This guarantee looks very like an engagement on the part of the defendant to pay the plaintiff money owing to him by Lewis, if he would forbear to sue Lewis for it."

2. *WOOD v. DIXIE*, 7 Q. B. 892.

Fraudulent Conveyance — Stat. 13 Eliz. c. 5.

Though it is a well-known elementary principle in the law that a conveyance of lands for good or valuable consideration by a debtor on the eve of bankruptcy and insolvency, with a view to defeat his creditors at large, is fraudulent and void; this rule has never been extended so far as to aid an individual creditor who is prevented by such a conveyance from levying the amount of his individual debt under a judgment. This distinction arises from the statutes of bankruptcy and insolvency, which expressly create a species of fraud in cases of this nature affecting the general body of a man's creditors. But it has been long settled that the mere intention to defeat an execution does not *per se* make void a sale for good consideration, and the present case is a peculiar example of the rule. The question turned upon the validity of a conveyance made of a house and furniture by one Phillips to the plaintiff in October, 1843. The plaintiff had lent money to Phillips to relieve him from an execution at the suit of one Norton; and Phillips being unable to repay the loan executed the conveyance in dispute. The transaction was closed on the 7th of October, and on the same day Sir W. Dixie, the sheriff of Leicestershire, seized the furniture under a judgment and *fi. fa.* in *Beckett v. Phillips*. The present action was thereupon brought against the sheriff, whose counsel at the trial contended that the conveyance of October, 1843, was fraudulent and void, as against Beckett, the execution creditor, within the stat. 13 Eliz., and that the goods continued to be the property of Phillips, so as to be liable to execution at the suit of his creditor. The learned judge instructed the

jury, that if there was no real payment, and the whole transaction was colourable, the defendant was entitled to a verdict; and further, that if there really was a payment, still, if the intention of the transaction was to defeat the execution creditor, the conveyance was void as against him. The defendant had a verdict, but the Court of Queen's Bench ordered a new trial. Lord Denman, C. J.: "We are always unwilling to decide without consideration upon a question involving a discussion upon first principles. But the law here being perfectly understood, we are bound to say that the ruling (of the learned Judge at Nisi Prius) was incorrect. The jury were given to understand that although the conveyance was made *bonâ fide*, and with a full intention that the property should be parted with, it would yet be fraudulent if made to defeat the execution. Such a motive does not defeat the assignment. We are clearly safe in going so far as to say that a mere intent to defeat a *particular* creditor does not constitute a fraud." Coleridge, J.: "The learned Judge told the jury that, assuming the fact of payment and the reality of the transaction, still, if the intent was to defeat the execution creditor, the transaction was void. That, I think, was going too far."

3. WOOLLEY V. SMITH, 4 Dowl. & L. 469.

Bankruptcy — Provable Debt — Unliquidated Damages.

The point of this case arose under the 47th section of the Bankruptcy Act (6 Geo. 4. c. 16.), which enacts that every person, with whom any bankrupt shall have really and *bonâ fide* contracted any debt or demand, before the issuing of the commission against him, shall &c. be admitted to prove the same, and be a creditor under such commission. Now, in cases of unliquidated damages, whether for tort or upon contract, it has long been held that there is no debt or demand provable under the commission or fiat. In *Utterson v. Vernon* (3 T. R. 548.), Mr. Justice Buller thus propounded the rule:—"The rule is this: if a creditor wish to prove a debt under a commission of bankruptcy, it is necessary that he should be able to ascertain the amount of it, without the intervention of a jury; and if it be so certain that he can swear to it, he is entitled to prove it under the commission." The point lately came under discussion in *Green v. Bicknell* (8 A. & E. 701.) There the plaintiff had contracted to sell to the defendant all the oil that should arrive by a certain vessel, at a certain price, and the defendant agreed to accept and pay for the oil. The ship arrived, and the oil was tendered before the defendant

became bankrupt, but he did not accept or pay for it; and the Court held that the demand of the plaintiff in respect of that breach of contract was not provable under the fiat. The case before us is a fair illustration of the same rule. The plaintiff entered into a charterparty, by which he undertook on the arrival of the vessel at Ichaboe, to load her with a cargo of guano for the plaintiff, and to deliver the same at Cork or Falmouth. The ship arrived at Ichaboe, but the defendant failed in supplying the cargo, whereby the plaintiffs lost their freight. On the 1st of July, 1845, judgment was signed in the action, which was assumpsit on the charterparty. On the 26th of November, 1845, a writ of inquiry was executed; the damages were assessed; and final judgment was signed on the 8th of December, 1845. A fiat had issued against the defendant in May, 1845; and on the 22d of August he obtained his certificate, subject to a suspension of six months, from the 8th of July, 1845. On the 3d of February, 1846, he was taken in execution under a *capias* in the action. He contended before the Court of Common Pleas, that the debt was provable under the fiat, and that he ought to be discharged from custody. But *per totam curiam*: "It appears to us, that this was, properly speaking, a demand for unliquidated damages, which could not be proved under the fiat, and consequently that the defendant is not protected by his certificate, nor entitled to be discharged out of custody."

4. STONES V. BYRON, 4 Dowl. & L. 393.

Witness — Advocate — Practice.

As this case involves a point of professional conduct, a short notice of it is desirable. In an action on a bill of exchange for 10*l.* before the Under Sheriff of Middlesex, the plaintiff appeared by his attorney, and the defendant by counsel. The witnesses having been ordered out of court at the commencement of the case, the plaintiff's attorney remained in court as his advocate, made a speech and called witnesses. The defendant's counsel having also called witnesses and closed his defence, the plaintiff's attorney then presented himself as a witness to rebut the defence, and although this course was objected to by the defendant, the Under Sheriff received the evidence; but the defendant's counsel declined to cross-examine him. The plaintiff having had a verdict, it was set aside by the Court of Queen's Bench. Patteson, J.: "Here the attorney for the plaintiff makes a speech and conducts the cause as his advocate, and examines the witnesses and addresses the jury in reply to the defendant's counsel, and afterwards, calls himself

as a witness. I must say, that I do not think that such a course of proceeding is proper, or consistent with the due administration of justice. It seems to me, therefore, that his evidence ought not to have been received, and, having been received, that there ought to be a new trial."

5. STEADMAN v. HOCKLEY, 15 Mees. & W. 553.

Pleading — Lien — Certificated Conveyancer.

In an action of detinue against a certificated conveyancer, to recover some deeds, left with him as instructions for business to be done by him for the client, the defendant pleaded a lien on the papers for the business done, *with and in respect of* the deeds, &c. To this plea there was a demurrer, which, after argument, was allowed, and the plaintiff had judgment. The principle of the common law is, that where the bailee of a chattel has expended his labour and skill, or money, upon it, he has a right of lien for his remuneration. But in the case before us it will be observed, that the right was claimed in respect of an article in the fabrication or improvement of which the defendant had not been employed ; and in the course of the argument, the learned Chief Baron put the case of a coat left with a tailor as a pattern, and inquired whether he could have any lien upon it, he having expended no industry upon it.

The following judgment was delivered by the Court. Pollock, C. B. : "The plaintiff is entitled to the judgment of the Court. . . . The principle applicable is well stated by Tindal, C. J., in *Bleaden v. Hancock* (4 C. & P. 152.). He says : 'This is not the case of a lien claimed by a person who has bestowed labour, or expended money, upon an article, and who may detain it until he is paid. Every body knows that by the common law a man may detain the commodity on which he has bestowed labour or money.' Nobody appears to have suggested in that case that, independently of any custom, there was a lien at common law, because of something done *with and in respect of* the plates which were delivered to the defendant. With respect to the cases (which have been referred to) of the jeweller weighing the diamond, and of the measuring of corn, by which the value of the thing is not apparently increased, the answer is, that the labour is bestowed upon the article itself. If a man has a lien for carrying corn, why should he not also for letting it pass through any other process which makes it more valuable, or appears to do so? An ingot of gold is more valuable when it has been assayed by the standard; it is more

likely then to find a purchaser, its quality having been ascertained : so also is an article of which the quantity has been ascertained. These cases, therefore, fall within the rule, that the lien exists wherever labour has been bestowed upon the article itself : here all that appears is that something has been done *with respect of* it : that does not create a lien. On principle, therefore, and upon the authorities, I am of opinion that this plea is bad."

6. *HAMBRIDGE v. DE LA CROUÉE & FRANCOIS*, 4 Dowl. & L. 466.

Partner's Authority — Warrant of Attorney.

Where parties have been damnified by the institution of suits or actions in their names without their sanction or authority, it has been usual to leave them to their remedy by damages against the solicitor or attorney who has misconducted himself : and the Courts have refused to set aside the proceedings, when regular on the face of them, lest such a course should be prejudicial to innocent third parties (see *Tarback v. Tarback*, 6 Beav. 134 ; *Hood v. Phillips*, Ib. 176 ; *Tarback v. Woodcock*, Ib. 573). But where the personal liberty of the subject is involved, a relaxation of this rule takes place. This appears from the present case, in which a partner signed a warrant of attorney in the joint names of himself and his co-partner, without any authority from the latter, for the amount of a debt of the firm. The plaintiff signed judgment on this warrant, and shortly afterwards issued execution against the person of the co-partner, who, on being taken, applied to the Court to set aside the proceedings : and the Court granted the application. Wilde, C. J. : "The present case differs from those in which the Court has left the party to his remedy against the attorney who has improperly appeared : for there the only question is as to the payment of a sum of money ; but in the present instance the liberty of the subject is concerned, as the defendant is in custody." Maule, J. : "Where the Court finds proceedings regular on the face of them, although the attorney carrying them on was unauthorised, if he is solvent, and therefore no prejudice will accrue to the defendant, it has abstained from interfering. But it has restricted its non-interference to those cases only where, however, the defendant is in custody in consequence of such unauthorised proceedings ; and injustice would be done unless the Court did interfere." Defendant was discharged from custody.

It is, however, worthy of remark, that in *Hood v. Phillips* (6

Beav. 176.), where a party had been improperly made a plaintiff in a Chancery suit by the solicitor without authority, and had been taken in execution for the costs of the cause, Lord Langdale, M. R., declined to discharge him from the arrest; though that was done by consent of the other parties.

7. GILES V. TOOTH, 4 Dowl. & L. 486.

Railway Committeemen — Consolidation of Actions.

Eleven separate actions had been brought against eleven members of the Provisional Committee of the Tonbridge and Rye Harbour Railway Company. It was clear and not disputed, that all the actions were brought for the same cause; and further, that if the defendants were liable, they were so jointly, and not severally. Under these circumstances, a rule *nisi* had been obtained on behalf of all the several defendants, to stay proceedings in all the actions, except such one as the plaintiff should elect to prosecute. But the Court of Common Pleas, on cause shown, discharged the rule. Wilde, C. J.: "This application is made on the ground that by the mode of proceeding adopted by the plaintiff, the defendants are subjected to peculiar hardship, from which they can only relieve themselves by a circuitous remedy, unless the Court interfere summarily. Now, the mere fact of the defendant being subjected to peculiar hardship, if the plaintiff is only exercising his right, is no ground for the Court's interference. Then had the defendants the circuitous remedy alleged? They contend, that they cannot plead in abatement, because they cannot show that the co-contractors are within the jurisdiction. If that is the case, then the relief by means of a plea in abatement is not within the power. They cannot, therefore, give the plaintiff a better writ, because they cannot comply with the conditions which the legislature has imposed on defendants, who seek to obtain the advantage of a plea in abatement. Why should the Court interfere to deprive the plaintiff of the benefit of that condition against the expressed intention of the legislature? The defendants have deprived themselves of the means of pleading in abatement, by the peculiar association with which they become joint contractors. The hardship of which they complain arises from that circumstance. It has not, therefore, been shown that the defendants have any circuitous remedy. If not, what abuse of the process of the Court has been disclosed, which should induce us to grant the application now made? The plaintiff is merely pursuing a strictly legal right; and, in the

exercise of that right, it is not shown that any abuse or oppression is used. The Court, therefore, cannot safely interfere in the way required." Maule, J.: "The plaintiff has a right to do what he is doing, and could not fully enforce his right by any other mode; and if we granted the application of the defendants, we should be infringing on the just rights of the former." Coltman, J.: "If the plaintiff joined all the defendants in one action, he might be nonsuited, as he would, perhaps, be unable to prove a joint case against all."

8. SKILBECK v. GARBETT, 7 Q. B. 846.

Evidence — Sending Letter by Post.

The plaintiff's clerk proved that in the general course of business of the plaintiffs' office, letters for the post were daily made up by the witness, and placed in a particular box in the room which he occupied in the office; and that the public postman invariably called every day, and took such letters from the box. The witness stated that the letter in question was made up in the usual course, and put into the box so kept. But no further proof was given as to the sending of the letter. Mr. Justice Coleridge, at *Nisi Prius*, held this to be sufficient evidence of the dispatch of the letter: and of that opinion was the Court of Queen's Bench. On a motion for a new trial, Lord Denman, C. J.: "I think the evidence given here was quite enough: and I have acted on that assumption repeatedly. If a public servant of the Post Office takes charge of the letter in the exercise of his public duty, it is the same as if it were carried to the office." Coleridge, J.: "Lord Ellenborough says, in *Hetherington v. Kemp*, (4 Campb. 193.), that if the porter had been called, and had stated that although he did not recollect the particular letter, he invariably carried to the Post Office all the letters found upon the table, this might have done. I think the evidence here was equivalent to that."

9. DOE v. SHARPLEY, 15 Mees. & W. 558.

Ejectment — Landlord and Tenant.

This case arose upon the construction of the Act 1 Geo. 4. c. 87. s. 1., which empowers landlords to recover possession of premises unlawfully held over by tenants after the expiration of their terms. The Court of Exchequer decided that the Act does not apply to a case where the term has not expired by lapse of time,

but the landlord claims a right of re-entry for breach or non-performance of covenants.

10. WALBANK v. QUARTERMAN, 3 C. B. Rep. 94.

Attorney — Liability to Fees of Bailiff.

The Court of Exchequer decided in *Robins v. Bridge* (3 M. & W. 114.) that an attorney was not liable to a *witness* for his expenses in attending a trial; and the present case raised a question apparently, in some respects, analogous, whether the sheriff's bailiff employed by the attorney to execute the judgment in the action was to look to the attorney or to the client for payment of the accustomed fees. Tindal, C. J.: "If authorities are necessary in such a case as this; enough are to be found in the books. In *Townsend v. Carpenter* (2 C. & P. 118.), it was expressly ruled that a sheriff's officer, employed by an attorney to make arrests on mesne process issued at the suit of his clients, may sue the attorney for the fees usually allowed for such arrests, on the taxation of costs by the Master. . . . And this ruling was confirmed by the Court of King's Bench in *Foster v. Blakelock* (5 B. & C. 328.), where Abbott, C. J. said: 'I perfectly agree with what has been stated, to show that the sheriff cannot maintain an action for fees beyond those which are given by statute. Here the bailiff could claim no fee beyond the 4*d.* allowed by the 23 Hen. 6. against the party arrested, but the prohibition extends to him only. The question is therefore open, whether, if an officer be specially employed to make an arrest, it may not be presumed that the party so employing him gives him to understand that he will pay such sum as the Court, upon the taxation of costs, is in the habit of allowing. I think that such an understanding may very fairly be presumed. Then of whom is the officer to receive this sum? Undoubtedly he may claim it from the attorney by whom he is employed, and is not bound to look to the party in the cause, of whom he knows nothing.'"

Maule, J.: "It can scarcely need authorities to prove that the *attorney* is the party liable to the officer. The case of a *witness* is altogether different."

11. BARRETT v. BLUNT AND COMFORT, 2 Carr & K. 271.

Railway — Provisional Committeemen.

An advertising agent brought an action against two members of the provisional committee of a railway undertaking, and proved

that the defendant Blunt was a member of the committee, and that Comfort, the other defendant, had attended one meeting at which an acting committee had been appointed. The defendant, Comfort, proved that after the first meeting he had written a letter stating that he had withdrawn from the committee: Counsel for the defendants thereupon submitted that the plaintiff should be nonsuited, — 1st, on the ground that the appointment of an acting committee exonerated the defendants; and, 2dly, that supposing the provisional committee liable, there was no evidence to show that Comfort ever joined it. It being a joint act, it was essential to establish the joint liability of the defendants. Erle, J.: “The case must go to the jury. As to the first ground, that where there is an acting committee the others are exonerated, Chief Baron Pollock’s opinion is the other way. It is not a clear point. As to the second ground, I think there is evidence, though slight, to go to the jury. Whenever a committee is formed, and is still in action, and taking steps to go on, then it is for the jury to say whether any one who has ever joined, ever consented to associate himself with the parties taking such steps, did or did not authorise those parties so to act. It is necessary to prove, 1st, that he consented to join them; 2dly, that he knew that they were continuing to act; and, 3dly, that the expenses incurred were usual and reasonable. Having once joined, he would remain a member until he expressed an intention to withdraw. I will leave the three questions above mentioned to the jury.” Verdict for plaintiff.

12. REGINA v. DOSSELT, 2 Carr. & K. 306.

Evidence — Proof of former Felony.

The prisoner was indicted for arson in setting fire to a rick on the 29th March, by firing off a gun very near to it: and in order to show the animus of the prisoner, evidence was offered of the rick having been on fire on the previous day, and of the prisoner having then been close to it with a gun in his hand. This evidence was objected to by the prisoner’s counsel, on the ground that the facts so proposed to be proved did not warrant the jury to infer, that the prisoner set fire to the rick on the 29th, because he did so on the 28th, and on the further ground that the firing on the 28th, if wilful, was a distinct felony. Maule, J.: “Although the evidence offered may be proof of another felony, that circumstance does not render it inadmissible, if the evidence be otherwise receivable. In many cases it is an important question whether a thing was done accidentally or wilfully. If a person

were charged with having wilfully poisoned another, and it were a question whether he knew a certain white powder to be poison, evidence would be admissible to show that he knew what the powder was, because he had administered it to another person who had died, although that might be proof of a distinct felony. In the cases of uttering forged bank notes, knowing them to be forged, the proofs of other utterings are all proofs of distinct felonies. I shall receive the evidence." The defence was, that the firing of the rick was accidental. Verdict, Not Guilty.

It will be recollected that similar evidence was received by Mr. Baron Parke against the prisoner Tawell, on his trial at Aylesbury, for the murder of Sarah Hunt, in January, 1845, by administering prussic acid to her in porter; the facts there offered in evidence being, that, in the previous month of September, he had visited the deceased, when some porter was sent for; after drinking which she became exceedingly ill. Facts of a like nature were proposed to be proved before Mr. Justice Abbott, at the Launceston assizes in 1817, on the trial of Mr. Donnall, a surgeon, for poisoning his mother-in-law with arsenic; and his Lordship received the evidence.

13. SMITH V. JEFFRIES, 15 Mees. & W. 561.

Contract — Ambiguity — Parol Evidence.

It is a rule of evidence that a latent ambiguity in a written instrument may be explained in order to do justice between the parties; so that when the words used apply equally to two different things or subject matters, evidence is admissible to show which of them was intended by the parties. But when the expression used in the written instrument applies, and can only apply, to one thing or subject matter, there evidence will not be received for the purpose of adding any particular term or qualification to a contract thus explained. It appeared in the case before us that the defendant had signed a written contract to supply sixty tons of Ware potatoes at 5*l.* a ton; and that in the neighbourhood where the contract was made, three qualities of potatoes were known, namely, Wares, middlings, and chats. Wares, however, were the largest and best. The plaintiff offered evidence at the trial that he had contracted for the best quality of a particular kind, viz. "Regent's Wares," whereas those offered by the defendant in pursuance of his contract were of an inferior description, viz. "Kidney Wares." The evidence having been received at the trial, the plaintiff had a

verdict; but it was afterwards set aside by the Court of Exchequer on the ground of the admission of the evidence in question. Alderson B.: "If I buy sixty tons of potatoes, surely the seller may deliver me kidney potatoes." *Per curiam*: "We think it is clear that the evidence ought not to have been received. It went to vary and limit the written contract between the parties. There must be a new trial."

II. POINTS IN EQUITY.

1. Infant — Jurisdiction. 2. Legacy — Mistake as to Legatee's Condition. 3. Parol Agreement — Part Performance — Specific Performance. 4. Agreement — Repudiated Trust. 5. Presumption of Death. 6. Trustee — Conduct in Office — Landlord and Tenant. 7, 8, 9, 10. Practice — Redemption Suit — Mortgagor and Mortgagee — Discovery — Production of Documents — Costs of Suit — Mistake — Appeal for Costs. 11. Execution — Just Allowances. 12. Infant-Custody — Access by Mother. 13. Evidence — Admission not mentioned in Pleadings.

1. In re SPENCE, 2 Phill. 247.

Infant — Jurisdiction.

Great difficulty is often experienced in bringing the jurisdiction of the Court to bear for the protection of infants in cases where there is no property to be administered for their benefit: and hence the opinion has extensively prevailed that in such cases the Court has not any jurisdiction. This opinion, however, was long ago pointed out by Lord Eldon to be erroneous, in the case of *Wellesley v. Duke of Beaufort* (2 Russ. 21.), where his Lordship says: "If any one will turn his mind attentively to this subject, he must see that this Court has not the means of acting except where it has property to act upon. *It is not, however, from any want of jurisdiction* that it does not act; but from a want of means to exercise its jurisdiction, because the Court cannot take on itself the maintenance of all the children in the kingdom. It can exercise the jurisdiction usefully and practically only where it has the means of doing so; that is to say, by its having the means of applying property for the use and maintenance of the infants." In the case now before us, which was a motion by the father of some infants for a *habeas corpus* against a party, who was alleged to have them improperly in his custody or power, the objection was taken, that the Court had no jurisdiction over infants, distinct from that at common law upon *habeas corpus*, unless there was

some property to be administered: and as the point is of some practical importance, the decisive judgment of the present Lord Chancellor is worthy of notice. Lord Cottenham, C.: "I have no doubt about the jurisdiction. The cases in which this Court interferes on behalf of infants are not confined to those in which there is property. Courts of law interfere by *habeas* for the protection of the person of *any* body who is suggested to be improperly detained. This Court interferes for the protection of infants, *quâ* infants, by virtue of the prerogative which belongs to the Crown as *parens patriæ*, and the exercise of which is delegated to the Great Seal."

2. RISHTON v. COBB, 5 Myl. & Cr. 145.

Legacy — Mistake as to Legatee's Condition.

Lord Alvanley, in *Kennell v. Abbot* (4 Ves. 802. 809.), gave the rule which has ever since prevailed in equity, that when a legacy is given to a person under a particular character or description, which he has falsely assumed, and which alone can be the motive of the bounty, the law will not permit the legatee to avail himself of it, and therefore he cannot demand his legacy. This is the general result of the decisions respecting legacies given to persons with a specific description annexed of their *status*. But where the testator is under a mere casual misapprehension of the *status* of the legatee, and the legacy is not given upon the positive condition that the legatee shall possess that *status*, the misdescription is imperative, and may be corrected by parol evidence. The testator in the case now before us left a sum of 2000*l.* to trustees, in trust to authorise Lady Campbell, described in the will as widow of Major General Sir N. Campbell, to receive the dividends so long as she should continue single and unmarried; but in case she should sell, assign, dispose of, or anticipate such dividends, he revoked the bequest, and directed that the fund should become part of his residuary estate. It turned out, that, at the date of the will, Lady C. was married to a private gentleman, but retained her own previous rank or designation. It was contended by the residuary legatees, that under these circumstances the legacy was void. The Vice Chancellor of England decided in favour of Lady Campbell, and decreed payment of the capital to her, as there was in effect a gift of the dividends, without limitation of time, which carried the stock itself. On appeal, this judgment was affirmed. Lord Cottenham, C.: "I am of opinion, that the testator's misapprehension as

to the situation of the legatee does not invalidate the legacy. To consider the being single as a condition precedent would be inconsistent with the cases which have decided that an error in describing the *status* of a legatee does not avoid the legacy. In this case, all that is necessary to carry his general intent in favour of the legatee into effect, is to reject a provision inapplicable to the real situation of the legatee. There is no gift over upon marriage or upon death, but only upon alienation, which is void, because inconsistent with the interest given. I dismiss the appeal with costs."

3. MUNDY v. JOLLIFFE, 5 Myl. & Cr. 167.

Part Agreement — Part Performance — Specific Performance.

Lord Cottenham, C.: "Courts of equity exercise their jurisdiction in decreeing specific performance of verbal agreements, where there has been part performance, for the purpose of preventing the great injustice which would arise from permitting a party to escape from the engagements he has entered into, upon the ground of the statute of frauds, after the other party to the contract has, upon the faith of such engagement, expended his money, or otherwise acted in execution of the agreement. Under such circumstances the Court will struggle to prevent such injustice from being effected; and, with that object, it has, at the hearing, when the plaintiff has failed to establish the precise terms of the agreement, endeavoured to collect, if it can, what the terms of it really were."

4. DALE v. HAMILTON, 2 Phill. 266.

Agreement — Repudiated Trust.

In 1843 some lands at Birkenhead were purchased by Dale, a surveyor, for one Macadam, on a building speculation, and on the 16th of October, 1843, the lands were conveyed to Macadam and one Hamilton as tenants in common. By a memorandum of agreement dated the 27th of October, 1843, and signed by Macadam and Hamilton, those two parties agreed to advance each one-half of the purchase-money, and to take each only one-third interest in the purchase, the remaining third being reserved for Dale in lieu of his commission for purchasing, settling, surveying, valuing, laying out in lots or any other services which might be required of him; but Dale was to have no power or authority over

the land, and was not to be entitled to any compensation until the whole was sold and paid for. This memorandum was delivered to Dale. Macadam and Hamilton afterwards, for some cause, refused to recognise Dale's interest in the speculation, and offered him a pecuniary compensation for his past services, and for such as he might still perform. The purchase had, in the mean time, greatly increased in value. Dale, under these circumstances, filed his bill against Hamilton and the representatives of Macadam, for an immediate sale of the land, on the ground that the repudiation of the trust created by the written arguments in his favour made it impossible to carry the speculation into effect between him and the other parties according to the original intention. It was contended by the defendants that the written memorandum was no declaration of trust, but merely an agreement, liable to be revoked by Hamilton and Macadam at any time, and that Dale, by changing his residence to a considerable distance from Birkenhead, had incapacitated himself for the performance of the services mentioned in the memorandum. The defendants also insisted on the Statute of Frauds in bar of the plaintiff's remedy under the alleged agreement, he being no party thereto; and claimed to hold the entire land in question, to the absolute exclusion of the plaintiff. Independently of this, they also argued that the agreement was void for want of mutuality, as the Court had no power to compel the plaintiff to perform the services mentioned in the memorandum. But on all these points the Court decided in favour of the plaintiff: and on the ground of the repudiation by the defendants of the trust in favour of the plaintiffs, the Court decreed that the plaintiff had a right to a sale of the property, and payment to him of one-third of the purchase money. Lord Cottenham, C.: "On the part of the defendants, it is asked in the face of the declaration of trust, of the 27th October, that, by dismissing the bill, I should tell the plaintiff, and tell the defendants too, that they the defendants having declared that they are interested in one-third each, are to keep the whole, and that, although they have declared that Dale is entitled to one-third, he is not to receive any thing at the hands of a Court of Equity; and *that*, upon a supposed application of the Statute of Frauds, a statute made to prevent fraud, and which, therefore, has provided that declarations of trust shall always, not originate in, but be evidenced by, writing. For there is this distinction between agreements and declarations of trust: in the one, it is the agreement itself, which is the origin of the interest, that must be in writing; in the case of a declaration of trust, which is only the recognition of a pre-existing interest, it

is the evidence and recognition, and not the origin of the transaction, that must be in writing. Here the declaration recognises a past transaction, because the purchase had been agreed to before Hamilton became entitled to any share in it: and in this agreement between Macadam and Hamilton, they recognise Dale's right. Now, it would be the strangest thing in the world, if, the statute being satisfied, which it is, by finding this writing signed by the parties, the Court should not give relief to the party whom that document declares entitled to it. It is nothing that the plaintiff is no party to this declaration of trust; that is not required. A declaration of trust may acknowledge a right in another party, if it is signed by the party, declaring that he is a trustee for the other. The right of the plaintiff then, under that document, to a third share in the profits of this land being clear, the conduct of the defendants removes the few topics that have been urged against the plaintiff's right; for if they, by their conduct, repudiate the trust, and endeavour to exclude him from that which they have themselves, under their hands, declared him to be entitled to, how are they to argue that *he* has withdrawn, and has not acted under the trust? If the refusal had been on his side; if they, acknowledging his title, had called on him to render those services which seem to have been part of the consideration for letting him into a share of the profits of this adventure, there might have been a difficulty in the case so presented. But when they insist that he has no right, and endeavour to exclude him, and tell him he has nothing to do with the land, there is an end of the case against the plaintiff for not having performed those services, which, by their conduct, they have shown they would have refused to accept, if he had offered to discharge them. The question then is, — resting the plaintiff's title on this declaration of trust, — what the Court ought to do. If the defendants, who are trustees, and who have declared themselves trustees, *quoad* the plaintiff's third — if they have themselves refused to perform the trust — if they, by endeavouring to appropriate the plaintiff's share to themselves, and to withdraw it from the plaintiff, who is entitled to it, have refused to do that, which, by the declaration of trust, they were to have done, — why it is like all other cases of trustees who refuse to execute the duty they have undertaken, and this Court will take on itself, as far as it can, to put the *cestuique* trust in the situation in which he would have been if the trusts had been properly performed. Now, all that the Court can do is this, — unless the parties will have sense enough, after what has taken place, to arrange among themselves some

plan more for their benefit, and they must do that out of Court.
 I must direct the land to be sold."

5. CUTHBERT V. PURRIER, 2 Phill. 199.

Presumption of Death.

The Vice Chancellor of England, in *Dowley v. Winfield* (14 Sim. 277.), expressed his opinion that the old rule of presuming the death of a party who had not been heard of for seven years was hardly applicable to modern times, when travelling is so general, and the means of transit to distant countries were so accessible to a large portion of society. In the case now before us a further illustration is presented of the degree of effect now likely to be given to the rule in question. An annuity having been bequeathed by a testator resident in India to a female native of that country, the annuity was paid up to August, 1815, by the executor, who then died. In 1817 a suit, in England, for the administration of his estate was instituted against his executors, Ranken and Gall, and a sum of about 3,500*l.* stock was carried to a separate account, to answer the annuity from August 1815, with directions to Ranken and Gall to apply it according to the trusts of the original will. They never applied for any of the dividends; and nothing more having been heard of the annuitant, an order was made in 1829, on the petition of the testator's son (who was entitled to the fund, subject to the annuity,) for the investment and accumulation of the dividends. In 1833 the son petitioned for a transfer of the fund, with the accumulations; and upon the Master's report, made in 1837, finding the annuitant dead, though he was unable to state when or where she died, or who was her personal representative, the Court ordered the capital to be transferred to the son, without requiring any security, but refused to part with the accumulations. In the year 1842, under a reference, upon another petition of the son, the Master specially found that the annuitant had not been heard of since August 1815, and therefore that she died on or before August 1822. On this report Lord Lyndhurst ordered a transfer of so much of the fund as had arisen from accumulation of dividends on the principal fund since August 1822, but retained the residue in Court. Finally, in 1847, Lord Cottenham ordered the residue, with its own accumulations, amounting altogether to about 1000*l.*, to be transferred to the son, on the terms of his giving a bond to the Master to refund in case the annuitant or her personal representative should establish a claim.

It will be observed, that in this case there was a mixed course of proceeding in the allowance of the presumption of death; the old rule of presuming death, in the case of a person who has not been heard of for seven years, being adhered to as to the capital of the accruing fund, while a much longer period was required in regard to the accumulated dividends.

6. *FERRABY v. HOBSON*, 2 Phill. 255.

Trustee — Conduct in Office — Landlord and Tenant.

The general rule and practice of equity by which a trustee is forbidden to make any personal advantage of his office, does not extend to those cases where the trustee's conduct is merely such as would be repugnant to the feelings of a man possessing a peculiarly high degree of honour and delicacy, or refinement. Some acute observations on this subject will be found in Lord Chancellor Brougham's judgment in *Hunter v. Atkins* (3 Myl. & Keen, p. 113.), which was a case of gift from a ward to a guardian; and the case before us presents some features which on these grounds may be worthy of attention. The bill sought to charge trustees with 42*l.* a-year more than they had received from the rent of a farm, part of the trust estates, from Lady-day, 1836, to Lady-day, 1839. The sister of one of the trustees was the tenant of the farm, and the bill charged that in order to favour her, the farm had, during the whole period of her occupation, been held at a rent below its value; that she was not acquainted with farming; that many farmers of credit and experience in the neighbourhood were desirous of occupying the farm; that the trustee, who was the brother of the tenant, had pastured his own cattle on the farm, and had otherwise acted as if he were himself the tenant of it, and had endeavoured to enrich himself at the expense of the trust estate.

The defendant's evidence, however, was so complete, that the charge of corruption fell to the ground. But with reference to the manner in which the trustee had exposed himself to imputations by letting the farm to his sister, some remarks were made by the Court which are deserving of notice. Lord Cottenham said, "I cannot part with the case, without observing (though in this case it happens that the facts which appear in evidence completely remove all suspicion), that trustees expose themselves to great peril in allowing their own relatives to intervene in any matter connected with the execution of the trust; for the suspicion which that circumstance is calculated to excite, where there is any

other fact to confirm it, is one which it would require a very strong case to remove."

The plaintiff had argued that if the charge of personal corruption failed, still great neglect was imputable to the trustees for not sufficiently watching the changes in the price of agricultural produce, and giving notice to the tenant to quit when grain was at a high price, so that a higher rent might have been obtained from a new tenant after a certain assigned date. It was insisted also, that in this respect favour was shown to the tenant as a sister of one of the trustees. Lord Cottenham said, "The charge (in the bill) is not a charge of neglect in having permitted a tenant, who originally entered at a fair rent, to continue in possession of the farm at that rent after a higher might have been obtained; and without saying what circumstances might or might not have made the trustee liable upon such a case, if it had been made, that case is obviously very different from one in which he is charged with personal corruption, and with appropriating to himself the property of others. Had he been charged with mere neglect, it might have been shown that although the land had increased in value, the increase was owing to the outlay of the tenant; and, in that case, no man would say it was the duty of the trustee, or even justifiable for him, to exact from the tenant the increase of value derived from his own expenditure; at least I am sure the effect of such a doctrine would be to make trustees very bad landlords; for unless tenants from year to year had such confidence in those under whom they hold, as to induce them to spend money in improvements with an assurance of not being disturbed in the enjoyment of the fruits of their outlay, it would be impossible for the land to be cultivated in this country, where so large a portion of it is occupied by tenants without the security of a lease. Whether the facts of the case would or would not have borne out such a defence, is immaterial; it is sufficient to say that if the charge made against him had been one of mere neglect, his attention would have been directed to it, and he might have shaped his defence accordingly. I cannot think that he was guilty of any breach of trust in not giving notice only six months after the change of value, even supposing that change to have been occasioned by a rise in the price of agricultural produce. I put it to [the counsel] to refer me to some authority, to show that a trustee letting a farm at a proper rent is personally to be charged with the difference between that rent so properly reserved, and the rent which might, at some future period of the tenancy, have been obtained, because he neglected to give notice to quit, a few months

after there appeared to be a probability that the price of agricultural produce would enable him with propriety, as between landlord and tenant, to obtain a higher rent. No such authority has been found; and there is no ground upon the facts before me for any such decision. I do not speak of a case of great neglect — certainly not of a case in which the omission to give notice can be referred to any favour shown to the tenant. But though it is not necessary that there should be actual fraud, yet the neglect must be so gross as to amount to something like fraud before a trustee can be charged with such omission as a breach of trust. All that part of the bill which sought to make the defendant personally liable in respect of his dealing with the farm, ought to have been dismissed with costs."

7. DUNSTAN V. PATTERSON, 2 Phill. 341.

Practice — Mortgagor and Mortgagee — Redemption Suit.

This was a redemption suit, and a special decree was made containing a direction to the defendant to transfer recovery, or re-assign the mortgage debts and premises free from all incumbrances. Lord C. Cottenham held, that a mortgagor has no right to require the mortgagee to assign the mortgage debt when he is paid off, and that such a decree was a departure from the contract and not justified by the law and practice of the Court of Chancery. His Lordship, therefore, declared that in imposing that term upon the defendant, the decree was erroneous.

8. HAVERFIELD V. PYMAN, 2 Phill. 202.

Practice — Discovery — Production of Documents.

The answer in this case admitted the defendant's possession of documents relating to the contents of the bill. After answer the plaintiff extensively amended his bill by striking out parts and otherwise; and then moved for the production of the admitted documents. The Lord Chancellor held that the motion was not sustainable. Lord Cottenham C.: "A plaintiff files a bill stating a variety of circumstances, and requiring an answer as to documents relating to matters therein mentioned. He then strikes out a great part, confining his bill to a portion only of what it before contained. On a motion of this kind it is for the plaintiff to show that the documents relate to the contents of the bill as it stands when the motion is made; for he asks the Court to act upon an

admission in the answer, and there is no admission in this answer that any of the documents relate to the matters at present contained in the bill as amended. . . . He might have moved before he amended the bill, or he might have required a further answer to his interrogations in the amended bill; and he is not without remedy, for he may amend his bill again for that purpose. At present I have no means of ascertaining whether the documents refer to matters in the bill as it stands, or only to that part of it which has been struck out."

9. BROUGHTON v. LASHMAR, 5 Myl. & Cr. 136.

Practice — Costs of Suit — Mistake.

In this case the plaintiffs were administrators of Mary Broughton, who was supposed to have died intestate; and the object was to recover from the defendant Lashmar some funds of which he was a trustee for the deceased. The funds were paid into Court in pursuance of a motion for that purpose. Lashmar was under the belief, as well as the plaintiffs, at the commencement of the suit, that the deceased had died intestate: but at an early stage of the proceedings, a will of Mary Broughton was discovered, by which the property in question had been bequeathed to Lashmar himself. On a motion by the plaintiffs to dismiss their bill with costs to be paid out of the funds in Court, the Lord Chancellor was of opinion that each party ought to pay their own costs. Lord Cottenham C.: "Let the bill be dismissed *without costs*."

10. CHAPPELL v. PURDAY, 2 Phill. 227.

Practice — Appeal for Costs.

As costs in equity do not necessarily follow the event of the suit, but are, in the discretion of the Court, awarded upon equitable considerations affecting the parties and their relative positions and conduct towards each other, the question of costs becomes extremely material in equitable suits, on account of the great expense attending such litigation. It has been laid down as a general rule, that there can be no appeal upon a mere question of costs personally payable by any of the parties; but that where costs are ordered to be paid out of a fund, there an appeal will lie from the order directing such an application of the fund; and so also where the question of costs involves a general principle, and is not merely an adjudication *in hac re*, an appeal may lie. (See

Angell v. Davies, 2 Myl. & Craig.) From the case before us, it further appears, that if an award of costs is contrary to any general rule and practice of the Court of Chancery in like cases, an appeal will lie. An injunction had been granted *ex parte* in this case, to restrain the infringement of the plaintiff's copyright in the opera of "Fra Diavolo;" but on the coming in of the answer, the injunction was dissolved, with liberty to the plaintiff to bring an action. Instead of doing this, the plaintiff amended his bill, and afterwards filed a supplemental bill. Witnesses were examined on both sides, and the cause came on for hearing, when the Court directed the bill to be retained for twelve months, with liberty to bring an action, the defendant undertaking in the mean time to keep an account of his sales of the music in question; and it was further ordered, that in case the plaintiff should not bring his action within twelve months, the bill should be dismissed with costs; but in case he should bring such action, and proceed to trial within that time, the costs and all further directions were reserved until after the trial. An action was brought, but a verdict was found for the defendant; and, on the cause coming on again, the bill was dismissed *without any order as to costs*. The Vice-Chancellor, in refusing to give the defendant his costs, was influenced by the defendant's conduct in the action. But from this part of the decree the defendant appealed, on the ground that his conduct in the action was a matter wholly for the consideration of the court of law, and could not be mixed up with the suit in equity, the costs of which ought to follow the event of law as a matter of course. The plaintiff argued, that as the appeal was for costs alone, it could not be entertained. Lord Cottenham, C.: "It is difficult to understand why the plaintiff should be in a better situation for having brought an action which failed, than if he had not brought an action at all. . . . It had been said that this was an appeal for costs only, and that, therefore, it ought not to be entertained. But the rule is not that there should not be an appeal for costs, but that the Court of Appeal will not go into a rehearing of the merits upon a mere question of costs. If, however, without going into the merits, it is apparent, on the face of the order itself, that the decision as to costs is at variance with a settled rule of practice, the Court of Appeal will set it right: and being of opinion that the present is a case of that description, and that, so far as it relates to costs, it is not only at variance with the established practice of the Court, but inconsistent with the decree in the same suit, I think the appeal in this case ought

to be allowed, and that, instead of the order made below, the bill ought to be dismissed with costs."

11. CHAMBERS v. SMITH, 2 Coll. 742.

Executor — Administration — Just Allowances.

Though it is the practice of the Court of Chancery to allow an executor to reimburse himself all expenses properly incurred in administering the assets, the Court nevertheless enquires into the prudence of the expenditure where any items in his accounts are likely to be affected by such a consideration. In the present case, the executors of Benjamin Chambers had charged his estate with the sum of 130*l.* paid to a surgeon for the costs of an action which he had brought against the executors for the sum of 75*l.* 16*s.*, being the amount of his fees for medical attendance on the testator. The executors also charged the estate with their own costs and expenses of defending the same action. They had refused to pay the bill, in the first instance, on the ground that the charges were immoderate; and they paid 52*l.* 6*s.* into Court. The surgeon obtained a verdict for 18*l.* 10*s.* more; and these two sums were only 5*l.* less than the amount of his original demand. The bill in equity sought the disallowance to the executors of the costs paid and borne by them in the action. Contradictory evidence by medical men regarding the propriety of the charges was read on both sides: but the executors failed in establishing, to the satisfaction of the Court, the prudence of the course which they had pursued. V. C. Knight Bruce:—"It appears to me that the executors' conduct in not preventing Mr. Tucker's action from being brought, by paying him (if necessary for that purpose) his whole demand, and in defending the action as they did, was so manifestly and so grossly imprudent, as to be inexcusable, and to render it impossible to allow them the costs paid to the plaintiff at law, or their own costs or expenses in respect of the action. The circumstance that the jury gave him 5*l.* less than the amount of the bill delivered is, in my judgment, immaterial, except as it enables the Court to allow to the executors that sum, of which, at an expense, as they say, of more than 200*l.*, they succeeded in depriving him. They may be allowed the 5*l.*, as if they had paid him his full demand. The decree will declare, that in respect of Mr. Tucker's demand of 75*l.* 16*s.* the defendants are to be allowed the full amount thereof, but not any costs, charges, or expenses, on either side, in respect of the action."

12. EX PARTE BARTLETT, 2 Coll. 661.

Infant-Custody — Access by Mother.

The stat. 2 & 3 Vict. c. 54. enables the Court of Chancery, upon the petition of the mother of infants in the sole custody of the father, to make order, if the Court sees fit, for the access of the petitioner to such infants, at such times and subject to such regulations as shall be deemed convenient and just; and if the infants be under seven years of age, the Court is empowered to order the delivery of such infants to the mother, to remain in her custody until they attain seven years of age. The same Act goes on to provide that no order shall be so made in favour of any mother against whom adultery shall be established by judgment in an action of *crim. con.*, at the suit of her husband, or by the sentence of the Ecclesiastical Court.

In the present case the petitioner, the wife of a clergyman, had had differences with her husband, who, for his violent conduct, had been bound over to keep the peace towards her. A separation ensued by her voluntarily withdrawing from his residence. She petitioned under the above statute, that two of her children, a boy and a girl, who were both under seven years of age, might be delivered into her custody, and that she might have access to her other four children at such times and under such restrictions as the Court should think fit. It was argued for the husband, in opposition to the petition, that the Court could not make any order on the application of a wife who had left her husband without just cause; that nothing like adultery had been proved, or attempted to be proved, against the husband; and that the violence which had taken place was a solitary act which did not constitute legal cruelty. The husband also desired a reconciliation. V. C. Knight Bruce: "This is a case in which the husband and wife are living apart from each other; the husband appearing to wish, and the wife objecting to, a reunion. No imputation, — nothing which the Court can call an imputation, — is made upon her beyond this, — that she has, without sufficient cause, as her husband says, — with sufficient cause, as she says, — separated herself from him. . . . The statute in question does not, as a condition of the interference of the Court, require that the wife should have obtained, or should be entitled to obtain, a divorce *à mensâ et toro*; and the existence of cases in which it may be right for the Court to interfere without a divorce, must, I apprehend, be considered possible. I am of opinion, that in the present case

the wife ought to have the present custody of the youngest child, a daughter under the age of two years, but not later, of course, than the age of seven years; and she should have access, under proper regulations, to the other children."

13. *McMAHON v. BURCHELL*, 1 Coop. t. Cott. 475.

Evidence — Admissions not mentioned in Pleadings.

As a general rule the Court of Chancery will not receive evidence in a cause except of those facts which are properly averred or distinctly referred to in the pleadings. But an exception seems to lie to this rule in the case of a written admission by a defendant of his liability to the plaintiff in the matter of the pending suit. Yet, though evidence of this nature is admissible where the record is silent on the subject, the Court deems it just, in such a case, to give the defendant an opportunity of explaining or rebutting the admission, and does not proceed at once to adjudication upon the evidence so tendered by the plaintiff. This was done in the case now before us, upon the hearing of an appeal before the Lord Chancellor. The respondent's counsel tendered in evidence, in addition to a letter set forth in the pleadings, certain other letters of the appellants acknowledging the liability of the latter in respect of the matters in question in the cause. It was contended that as such letters would be evidence in a Court of law, they were not less so in a Court of Equity — saving only, that in case either party should be exposed to a surprise by the production of such evidence, no effect should be allowed to it until the other party should have had opportunity to controvert it: and of that opinion was the Lord Chancellor Cottenham, notwithstanding the argument of the appellants, that no written confession or acknowledgment of a conclusion of law could be admissible unless it had been first put in issue by the pleadings. The Lord Chancellor, in giving judgment, said he could not think where there was a document or writing containing an acknowledgment or admission, that such document or writing could not be received in evidence, merely because it was not stated in the bill or the answer. He had very often laid it down, that it would be most unjust to bind the interest of a party by any document or writing of this kind, unless set forth in the pleadings, and the fullest opportunity given of explaining or contradicting it. But he was not aware that he had ever stated that such document or writing was not receivable in evidence. He had never gone the length of say-

ing that evidence of an admission is not admissible, merely because it was not put in issue. If the party was taken by surprise the Court would not act upon it without farther investigation. His Lordship added that the rule upon which he had always acted was correctly stated by the Vice Chancellor Wigram in *Malcolm v. Scott* (3 Hare, 63.), that a written admission of a party's liability may be read in evidence, although not stated in the pleadings — but that the Court would not bind the interest of the plaintiff by such admission without giving him an opportunity of disproving or explaining it.

[To this case the reporter, Mr. Cooper, has subjoined a large collection of decisions in the English and Irish Courts of Equity on the rejection, and on the reception and effect of evidence where admissions, confessions, and acknowledgments parol and documentary, and other matters of fact or of fraud, or other conclusions of law, or the proofs thereof, are not specified in the pleadings or put in issue; and though the matter thus supplied encroaches somewhat largely on the space, which, in a modern volume of reports, is expected to be allotted to current or cotemporary decisions, there can be no doubt that the materials thus copiously supplied by Mr. Cooper will be of great service to the profession.]

III. POINTS IN THE LAW OF PROPERTY.

1. Tenancy from Year to Year. 2. Statute of Limitations — Tithes.
3. Devise. — Construction. — Moiety.

1. DOE D. CLARKE V. SMARIDGE, 7 Q. B. 957.

Landlord and Tenant — Tenancy from Year to Year.

A notion had of late years gained considerable ground in Westminster Hall, that a tenancy *from year to year* must necessarily be a tenancy for two years certain at the least. It seems to have been considered, that the first year must elapse before either of the parties could signify their desire to determine the tenancy; and that then no notice could have full operation till the end of the two years. It was argued that upon any other supposition, no effect beyond that of a lease for a year, *simpliciter*, would be given to a demise from year to year. The case before us, however, does good service by exploding this notion. Clarke, the lessor of the

plaintiff, had demised the premises to the defendant for a term of three years, which expired at Lady-day, 1842. After that day Smaridge, the defendant, held over, without any express agreement, and paid the rent at Midsummer to Clarke, who received it without objection, and shortly before Michaelmas gave the defendant notice to quit at Lady-day, 1843. Defendant not having quitted pursuant to the notice, Clark distrained for the balance of the rent due at Lady-day, 1843. An ejectment having been then brought, the tenant contended that by his continuing to hold without disturbance after Lady-day, 1842, a new tenancy commenced from year to year, and must, therefore, be construed as for two years certain. At the trial, Mr. Justice Patteson was of opinion that that doctrine did not apply to a holding over after the determination of a lease for a year certain: and he refused to nonsuit the plaintiff. His Lordship told the jury that the distress for rent showed the continuance of the relation of landlord and tenant after Lady-day, 1842: but that Clarke was entitled to eject after the expiration of one year from the expiration of the lease, unless proof of a different agreement were given. The plaintiff had a verdict: and on a motion to enter a nonsuit, the ruling of the learned Judge was confirmed by the full Court of Queen's Bench. Lord Denman, C. J.: "It is plain that a tenancy from year to year arose: and the question is, whether it enured for two years certain from Lady-day, 1842. Now, a tenancy from year to year lasts only so long as both parties please: that is, it is determinable by either party at the end of any year, by giving notice to quit half a year before the end of the year. There is no reason why it should not be so determined at the end of the first year, as well as at the end of any subsequent one, unless the parties have by express contract prevented such determination. . . . In this case there is no such express contract; but a tenancy for two years at least is supposed to be implied of necessity by law. The case of *Bishop v. Howard* (2 B & C. 100.) was cited for the defendant; some words which fell from Lord Tenderden being supposed to be applicable. But on looking at that case, it will be found that the words there used do not affect the present question; they show only that by holding over, and payment of rent as rent, a tenancy from year to year is created; but they do not touch the question when that tenancy is determined. We are of opinion, that the tenancy from year to year so long as both parties please, is determinable at the end of any year, the first as well as any subsequent year, unless in the creation of the tenancy the parties use any expression showing that they contemplate a tenancy for two years at the least. Here

there are no such words, and the notice to quit was therefore sufficient. . . . It would be absurd in principle, and even inconsistent with the contract, to hold that the tenancy exists from year to year determinable by half a year's notice by either party, and yet to hold that neither can give such notice during the first year."

2. DEAN AND CHAPTER OF ELY V. CASH, 15 Mees. & W. 617.

Statute of Limitations — Tithes.

By the act 3 & 4 Will. 4. c. 27. s. 2. the time for bringing an action to recover any land (which by the interpretation clause includes tithes) is limited to twenty years next after the right of action accrues. The Court of Exchequer has decided that the act applies only to cases of conflicting title to the *estate* in the tithes, and does not operate in cases where no dispute exists as to the title, but the tithe-owner merely claims the tithes as *chattels* from the occupier of the lands; and although in the case before us no such tithes had been set out for twenty years, the Court held that, notwithstanding the act 3 & 4 Will. 4. c. 27., the plaintiffs could maintain an action of debt on the stat. 2 & 3 Edw. 6. c. 13. for the recovery of treble the value of the prædial tithes omitted to be set out, as claimed by the Dean and Chapter.

A point of the same nature arose in the case of *Grant v. Ellis* (9 M. & W. 113.), where the same Court held that the word *rent*, which in the act 3 & 4 Will. 4. is included under the designation of *land*, meant there an interest or estate in a rent, and did not apply to unpaid rent reserved, as between landlord and tenant, upon ordinary leases. Alderson, B.—“We think this question concluded by the authority of the decision of this Court in *Grant v. Ellis* as to rent. In that case we construed the word *rent* in the 3 & 4 Will. 4. c. 27. s. 2. as confined to cases where an estate in the rent is claimed, and where the defendant sets up an adverse possession of the rent itself for twenty years, as an answer to the plaintiff's claim. There, as here, the word *rent* had an ambiguous meaning, being either the estate in the rent, or the rent reserved under a lease: and we held, that in this section it was confined to the former meaning alone, and that a mere non-receipt of rent, under a lease for more than twenty years, did not deprive the lessor of his right to rent under the lease. Here, by the interpretation clause, it is proved that the word *land* includes *tithes*. But *tithes* is, like *rent*, ambiguous: it

may mean either the estate in the tithes, or it may mean the chattel itself, the fruits of the estate. We find it, however, included in the word *land*, and no one doubts that the word *land*, in its proper sense, applies only to cases in which there are two persons, each claiming an estate in the land adverse to the other. We therefore think we ought to confine the operation of this section to cases where there are two parties, each claiming an adverse estate in the tithes. Therefore a person who has received no tithes for twenty years cannot recover the possession of them from another who has for twenty years received those tithes from the terre-tenant. This construction reconciles the 3 & 4 Will. 4. c. 27. s. 2. with Lord Tenterden's Act for shortening the time of prescription in such cases, and for limiting it in a case of tithes to a period of sixty years, and three incumbencies; for Lord Tenterden's Act clearly applies to the tithes as a chattel, and provides a limitation to protect the terre-tenant in his prescriptive mode of rendering them to the clergyman or tithe-holder. It is very improbable that the legislature could have intended, *sub silentio*, to have repealed so important and well-considered an Act. . . . Our construction has the advantage of reconciling both Acts, and of removing what would otherwise seem an apparent neglect and carelessness on the part of the legislature."

3. DOE v. FAWCETT, 3 C. B. Rep. 274.

Devise — Construction — Moiety.

Though the old rule of interpretation, which gave only the effect of an estate for life to a devise of real estate without words of limitation annexed, has been superseded by the Wills Act of the present reign, the question as to the operation of such devises may still come under discussion with respect to the wills of those testators who died before the passing of that act. The present case was one of this nature. George Atkinson made his will in these words: "I give and bequeath to Richard Atkinson my moiety of the house which he now lives in, in Finkle Street, in Richmond." The lessor of the plaintiff contended that this devise conferred upon Richard Atkinson only an estate for life. But the Court of Common Pleas ruled, that R. Atkinson took a fee. Tindal, C.J.: "The question depends, as it appears to us, upon the proper interpretation to be put upon the words, *my moiety*. If those words do, in their natural and ordinary signification, import the interest which the testator had in the house, then we think this

devise will carry the whole interest he had, that is, the fee: but if, on the other hand, the words ordinarily have a narrower meaning, and are considered to import no more than half of a house, then, undoubtedly, the devise of that half of the house would be a devise for life only. And it appears to us, that the word *moiety*, which is accompanied generally, whether in pleading or in conveyancing, by the word *half-part*, as synonymous or explanatory of its force, carries with it the signification of the part or interest which the party takes in any subject matter; so that, when a man devises his moiety, he devises his half-part or interest which he has in the thing devised We think the words of this devise are sufficient to carry the fee."

4. HILTON V. GIRAND, Law Journal, C. C. (1847), 285.

Mortmain Act — Charitable Uses. |

The V. C. Knight Bruce decided in this case, that shares in the London Dock Company, and the West India Dock Company, are not within the Mortmain Act. The Acts by which those companies were incorporated expressly provide that the property should be deemed to be personal estate, and transmissible by will as such, and in case of no will, should be distributed as personal estate: but the question remained, whether, notwithstanding these provisions, the Mortmain Act was so far repealed, as to allow shares in the Companies in question to be bequeathed to charitable uses. His Honour was of opinion, that the charities were entitled to the shares as not being "Lands, tenements, or other hereditaments, or any estate or interest therein, or any charge or incumbrance affecting any lands, tenements, or hereditaments."

5. FEISTEL V. KING'S COLLEGE, CAMBRIDGE, Law Journal, C. C. (1847).

College Fellowship — Assignment of Income.

This was a suit against King's College and one of its Fellows to establish an indenture of assignment, whereby the fellow in question (Mr. B.), had granted the income and emoluments of his fellowship to the plaintiff as a security for money lent. It was objected that the transaction was contrary to public policy, as being inconsistent with the intentions of the founder, and rendering the defendant, Mr. B., incapable of performing the duties of the office. Lord Langdale, M. R.:—"I am of opinion that there is

nothing in the nature of the income which a fellow of King's College is entitled to, from which it can be inferred that his income and emoluments are not assignable in equity by reason of the uncertain amount or otherwise. But the question here is, whether there are any such duties incident to the situation or office, as it is called, of a fellow, as to make the assignment of the income contrary to public policy. The assignment may be contrary to the implied intention of the founder of the college, contrary to the spirit of the statutes, which are the exponents of the intentions of the founder, and may, therefore, expose the assignor to consequences very unpleasant to himself and very injurious to those who have dealt with him on the faith of his assignment; it may be a violation of his duty to the College, and very reprehensible, without being on that account void, as contrary to public policy. There is nothing in this case which appears to me in any degree to resemble any of the cases in which assignments of income have been held void on the ground of public policy. The College may deal as the law allows them with a fellow who has assigned his fellowship, but I am at a loss to conjecture what special interest the public can have in the question, whether Mr. B. does or does not continue to be a fellow, — does or does not hold himself in readiness to perform such slight duties as are annexed to the benefit he is intended to enjoy. I do not think the public are at all concerned in the question, whether Mr. B. continues to be a fellow or not, — whether the fellowship now occupied by him, shall be, at any time hereafter, occupied by him or any other person: and I do not propose to interfere, in any way, with the internal arrangements of the College, with their authority over individual fellows, or the dividends they may apportion in respect of any fellowship. I am to consider only the dividends which they may, at this time or hereafter, apportion to Mr. B. It appears to me, that Mr. B. has effectually assigned such dividends as may be apportioned to him, and that there is no sufficient reason to induce this Court to abstain from giving effect to such assignment; and, therefore, I must order, that for the purpose of paying what is due to the plaintiff, the sums of money which already have been, or may hereafter be, apportioned to Mr. B. in respect of his fellowship, shall be applied in or towards satisfaction of the plaintiff's demand; and the necessary accounts must be taken."

LIST OF CASES.

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| Barrett v. Blunt and Comfort, 193. | Haverfield v. Pyman, 204. |
| <i>Ex parte</i> Bartlett, 208. | Hilton v. Girand, 214. |
| Broughton v. Lashmar, 205. | McMahon v. Burchell, 209. |
| Chambers v. Smith, 207. | Mundy v. Jolliffe, 198. |
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| Feistel v. King's College, 214. | Wood v. Dixie, 186. |
| Giles v. Tooth, 191. | Woolley v. Smith, 187. |
| Hambridge v. De la Cronéc, 190. | |

POSTSCRIPT.

THE Local Courts have now been on trial for six months, and we think it must be admitted that the experiment has succeeded. Authentic particulars as to all the courts are not yet furnished; but it will not be uninteresting to give some details as to one district, the particulars of which have been communicated to us. In this district the population appears to be between three and four hundred thousand, and between the months of March and the Courts that were holden in the month of September last, the number of summonses that appear to have been issued was about 5600. In one place, upon the average of eighty cases, the sums sought to be recovered appear to have been 4*l.* each case. In another place, upon an average of 1100 cases, the average upon each case appears to have been something less than 3*l.*; but taking the average of each case to be 2*l.* 10*s.*, the sum sought to be recovered in the half year in the above district would amount to the sum of 14,000*l.*, which for the year would be 28,000*l.* If the district above alluded to be a fair average of the number of actions in the fifty-nine other districts for the last half year (in some no doubt it exceeds and in others it falls short of the average), the sums sought to be recovered in the several Courts for the last half-year would amount to the sum of 840,000*l.*, being at the rate per annum of 1,680,000*l.*

Although favourable to the measure as a whole, we conceive that the manner of raising a fund for the providing a Court House and Offices (see sect. 52.) is exceedingly objectionable; it provides that wherever the debt or damage claimed shall exceed 40*s.*, 5*l.* per cent. shall be paid by the plaintiff, or considered as costs in the cause. We have heard that this payment has been very frequently objected to, and we conceive not without reason: in many instances, in the towns in which the Courts are held, there are already

existing excellent Court Houses, the use of which is allowed for a trifling consideration ; and where this happens the parties applying for summonses frequently object to the payment of the above tax. The expense of building Courts, where necessary, ought not to fall wholly upon the present suitors : nor ought parties who reside in districts where Court Houses already exist, to be subjected to this tax. Still we admit, that where proper places do not already exist for the convenient administration of justice, that suitable provision should be made for that purpose ; and we conceive that, without entering into the minute details that the schedule to the Act prescribes with respect to the fees to be paid, and the observing of which is attended with much embarrassment and complication in the accounts, and consequently expense, a more simple and less objectionable scale of fees might be adopted, which at the same time would be more productive. We conceive that, if where the demand is 20*s.*, the costs of the plaint were to be 1*s.* 6*d.*, and the costs of the hearing 3*s.* 6*d.*, and where the demand was 20*l.*, the costs of the plaint were to be 1*l.* 15*s.*, and of the hearing 2*l.* 10*s.*, and so in proportion for intermediate sums, there would be less objection to such a scale of fees than to those directed by the Act ; and moreover, it would add, if that be necessary, to the fees in this proportion, that if they were now 7,000*l.* *per annum*, the additions made to them would be about 1680*l.* We would earnestly recommend to the Government that they should take into consideration the substituting the above mode of assessing the sums to be collected from the suitors, for that prescribed by the Act.

If our statement as to the amount of the sums recovered under the Act is even an approximation to the truth (and we do not believe it to be exaggerated), we do not hesitate to say, that the Act has been most beneficial in its operation.

An impression appears to prevail among many highly respectable practitioners, that the establishment of the Courts under the above Act will have the effect of excluding them from a branch of professional business, to the continuance of which they consider themselves entitled by the labour and capital they have expended in qualifying themselves for the

duties of their profession. We do not conceive there is any just cause for this apprehension ; for even if these Courts should interfere with some branches of their business, yet it is well known, that the superior Courts cannot meet the duties that devolve upon them; and that in so far as they are relieved by the establishment of the County Courts, other business will be brought before them, which is now compromised by a sacrifice of just rights to avoid the vexation, delay, and expense that inevitably accompany the prosecution of claims in the superior Courts. Besides this, we are satisfied that a feeling will be diffused by the County Courts, that justice is substantially administered; which will in the end prove favourable to the interests of the profession in every sense of that word.

The Judges have hitherto been paid by fees; but Government has recently announced its intention of acting by order in council on that provision of the Act (s. 40.) which limits their salary to 1200*l.* a-year. In many of the Courts this will very considerably decrease the receipts of the Judges, and in very few, if any, will it increase them. As the measure has succeeded so well, and as it has so soon paid all expenses, we think that there is both justice and good policy in taking a liberal view of the salary given by the Act, especially as additional duties have been imposed on the Courts by the Bankruptcy and Insolvency Act of last session.

Under that act (10 & 11 Vict. c. 102.), which transferred the appeal in bankruptcy to the Court of Chancery, the Lord Chancellor had the power of appointing the Vice-Chancellor, to whom the jurisdiction of the Court of Review should be transferred. The Vice-Chancellor Wigram has been so appointed.

We have to record the death of Mr. Lynch, lately a Master in Chancery. He was distinguished as a law reformer, and was almost the first to recommend those measures for the improvement of Ireland, which are now being slowly adopted. He died at Tournay in France, on the 13th of July last.

M. Von Savigny, the Prussian Minister for the Revision of the law (for in this country there is a distinct department for this purpose as well as a separate Minister of Justice) has had

additional rank conferred on him. A new Prussian criminal code is on the point of being issued. In the mean time, the first criminal trial, open to the public, has taken place in the proceedings against the Poles for high treason. This has already led to many important results, highly favourable to the liberty of the subject, and we do not doubt that this mode of trial will be extended to the other German states.

The punishment of death has been recently abolished in Sweden, and in Tuscany. We are informed that 100 members of the new Parliament will vote for its abolition in this country.

On the 22d of September Mr. Charles Buller, at a public dinner at Liskeard, after saying, "I know no more than the humblest of my auditors what measures the Government are prepared to bring before Parliament in the ensuing session," thus continued: "We have much yet to be done in the reform of our financial policy and the state of our laws. As a lawyer myself, I say it with all deference to my learned friends around me, and whose frowning brows are knitted against me on the present occasion—I say it with all deference to you, Mr. Mayor, the state of the laws of our land, improved as they have been by the County Courts, is still a disgrace to this country. (*Cheers.*) I say the administration of the laws, civil and criminal, chancery and common law—I will even go so far, with the permission of Dr. Curteis, as to say ecclesiastical law, even the law of the spiritual courts—is the disgrace of this country." Although Mr. Buller is not in the Cabinet, yet, as he fills the important office of Judge Advocate, we are persuaded he would not have made so sweeping a denunciation without some good reasons for it. We conceive that the new Parliament is one highly favourable to law reform, and this may justify the statement. Without agreeing with Mr. Buller in his general attack on every branch of the administration of the law, there are some parts of it as to which no time should be lost in devising the proper remedies for admitted defects. The Law of Real Property is now referred to a Commission for that purpose. But the Court of Chancery, and, certainly, the Ecclesiastical Courts also, require great alterations to adapt

them to the necessities of the present time. Fortunately for the public, one of the brightest qualities of the present Chancellor is the conscientious disposition of his patronage. We have no fear, therefore, that in the present state of his own Court he will make any appointment which would put it out of the power of the legislature to make the necessary alterations, or even to defer them. We certainly expect from his Lordship reforms adequate to the occasion; there is none more capable of giving them, and we believe none more willing.

In the midst, however, of these severe blows to the law, thus dealt by influential persons, we cannot but again express our regret that there is no department of the State charged with the duty of inquiring into the justice of the complaints, and applying the necessary remedy: there is in England no machinery for this purpose. Persons may be appointed, from time to time, to undertake isolated parts of this duty; but they can rarely give undivided attention even to such partial inquiries, and have usually to learn their business for the occasion. This might be endurable if there were no demand for alterations in the law; but nobody can justly say that this is the case. There is a growing dissatisfaction in the public mind as to certain portions of the law; and this may lead to a general clamour against our legal institutions, unless promptly and skilfully attended to. The maxims of our Common Law, the principles of our Courts of Equity, are sound and wholesome; there is even much that is admirable in our procedure: but then there is much that must be cut away. Who is to determine what shall be preserved? How long is it before we shall have a MINISTER OF JUSTICE?

No casual observer can fail to perceive that there is at present much uneasiness in the profession: some part joining with the public, and demanding further changes; the other part feeling alarm at those that have been already made. We should wish, under these circumstances, to see a more earnest endeavour to set the profession right with the public. There is no use in disguising the truth. The lawyer is usually looked upon by the bulk of the community as a sharp, grasping

creature, thinking only of his own interest. The many acts of kindness, generosity, and disinterestedness daily performed by members of the profession are unknown. The public should be disabused as to their wrong impressions: and a noble vocation it will be for any individual or body of individuals to perform the task. But any association for protecting the interests of the profession, as opposed to those of the public, will not only fail in its object, but increase any unjust impression as to the lawyer, and thus injure the cause which it attempts to benefit; and more than this, it will be laughed at even by the profession itself.

Oct. 26. 1847.

THE LAW REVIEW.

ART. I. — THE REPORTING SYSTEM.

IN a country, were any such possible, possessed of a code of laws absolutely complete or perfect in all its branches, the office of the Judge, in the rare cases in which such a functionary would be wanted at all, would be confined to ascertaining and declaring to *which* article of the code the question brought before him was referable: that point once decided, the whole matter would be settled; and as it would be hardly possible that a second case, exactly similar to the first in all its circumstances, could ever arise, it would be of little importance to the jurisprudence of the state that any record of the judgment should be preserved.

In proportion, however, as the laws of a nation recede from this Utopian standard, the importance of judicial decisions, and the difficulty of making them, reciprocally increase. It is no longer a sufficient qualification for the Bench to be familiar with chapter and verse of the Statute Book, and to have common sense enough to see whether a case falls under Article 3. or Article 4. The Judge has now a far different and more arduous task: in addition to ascertaining what is the nature of the *case*, he has first to ascertain what is the *law*; and that, not by turning to the index of his code, but by processes increasing in difficulty according to the confusion and imperfection of his materials, until, in England, (which, it must be admitted, is pretty nearly at the antipodes of Utopia in this respect,) he is obliged to eliminate his prin-

to hear that after a law had been once "ascertained" with all that conscientious toil so lavishly bestowed by our Courts on the "pursuit of justice under difficulties," the result would be solemnly enrolled and promulgated under the eye of the Court by its own officers with the same justly jealous precautions as are taken by the supreme Legislature, for preserving the inviolable and indubitable authenticity of *their* acts; and that the people to be governed, after they had taken the trouble to learn, first, that a law on any subject had been laid down; secondly, where to seek for it; and thirdly, how to understand it; might, at least, be able to arrive at some sort of certainty at last, and have it in their power to say, "*We know* what the Court decided in such and such a case."—How would our visitor stare on being told that the sole record preserved of these laws was to be found in the publications of some private individuals, who, without any orders from, or being in any way under the control of, the Courts, thought proper, for their own convenience, or as a literary speculation, to take notes of and print what they might have happened to have heard going on! And that these notes, as soon as published by the authors, became, without more ado, without even a ceremonial adoption of them by the Judges, the *law of the land*!

The registrar's books and other records of the Courts will perhaps at first occur to most of our readers as providing those authentic statements which we complain do not exist; but a little consideration will soon show that these, even if they were published, (and unless published they are obviously useless for all practical purposes,) would not supply the want of what we commonly understand by the term "Reports," and furnish, therefore, no excuse for neglecting to secure the authenticity of those productions. It may be granted that it is only for the purpose of arriving at a decision in the case before him, that the Judge has any authority to declare the law, and it is therefore in a manner true that all the law that a Judge can lay down is to be *found* in the decree; that is to say, *implied from it*:—to borrow, with all reverence, the expressions applied in the sixth article of our Faith to the Scriptures, "Whatsoever is not read therein, *nor may be proved thereby*, is not

to be required of any man that it should be believed." But it is this very fact which makes the Court Records practically almost valueless (valueless, we mean, in the point of view under which we are now considering them), for since to know the decree is nothing unless we also know the circumstances of the case in which it was made, so as to ascertain whether any given point was immediately before the Court or not, it follows that if we are to rely on the records alone we must read through all the pleadings, all the affidavits, all the Master's reports,—each of which is to be sought in a different receptacle, more or less easy of access,—before we can arrive at the necessary certainty as to the law. It is evident that documents such as these are in no wise fitted to be quasi Statute-Books; and in fact no one ever does think of using them as such, or, indeed, of using them at all¹, except as means of *verifying* statements otherwise obtained. Again, the records contain no memorial of what we must consider of infinite importance to the right understanding of a judgment; we mean the *process of reasoning* by which the Judge arrived at his conclusion. We know, indeed, that it is said that the *reasons* are no part of the *judgment*, and judges are sometimes heard to declare that they consider themselves bound by a decision of one of their predecessors, but that they nevertheless are of opinion that that decision was come to on false grounds. But what can be more unreasonable and illogical than this? It is *possible*, of course, that a conclusion (so called) may be true in fact, although it do not follow from the premises to which it is assigned; but is it *likely*? and at all events has a conclusion thus arrived at any claim to be treated with respect? The odds are *against* it; its amount of credit, so to speak, is a *negative* quantity; and we must say that we have always considered it a most undignified piece of perverseness to affect to ascribe a sort of infallibility to a Judge's decision at the same time that discredit is thrown upon his powers of reasoning. We cannot

¹ An unreported case is now and then exhumed from the registrar's book, to the great consternation of all parties; but we are speaking, of course, only in generalibus.

believe that it is a constitutional doctrine that a decree from the bench has the same magical privileges as the enchanted bullet in *Der Freischutz*, and is sure to hit the right object, although the gun be pointed the other way. Surely the judgment and the reasons for it are too intimately connected to allow of such distinctions; they must stand or fall together; if the latter are good, that is a strong ground for upholding the former: if they are bad, the other cannot be worth much. On this account also, therefore, the registrar's books, &c. are no effectual substitute for reports. Again, there are many matters worthy of remembrance decided by the Courts, such as points of practice, which do not, or may not, appear on the record at all.¹ But it is probably unnecessary to urge this point any further; what is wanted is, an *authentic abstract* of the *case*, the *arguments*, and the *judgment*; and no one, we presume, will affirm that this want is supplied by the records, or will deny that, practically at least, it is not they, but the Reports, that are used, cited, and received as the chronicles of the progress of the laws of England in their career of self-development.

We particularly desire that it may be remembered that it is no mere want of *theoretical* elegance or system that we complain of, but a real practical evil. If there were any Reports that were universally admitted to be authentic and unimpeachable, we should care comparatively little how they were produced, whether under the superintendence of the Courts or by the industry of individuals. But our Reports are not authentic, either *de jure* or *de facto*. Some reporters, to be sure, enjoy a sort of semi-official character, and are furnished, we believe, by the Judges with copies of their judgments (when they happen to have written any), and have opportunities of seeing the briefs of the counsel, and other documents relating to the cause; but are there any reports which are not liable to be *accused* of incorrectness?—any, in short, which are accepted in the same unhesitating

¹ "A great number of rulings upon points of criminal law are to be found in private manuscripts only." First Report of the Criminal Law Commissioners, p. 2.

way in which the Rolls of Parliament are accepted as evidence of *it's* decrees? Even with the careful reporting of the present day, it is not uncommon to hear Judges complaining that they *did not say* what they are reported to have said; and however actually correct they may be, so long as the Reports have no official character, and are liable to the suggestion that there *must be some mistake*, that the Court *could not have meant*, &c., they lose one-half of the value of their correctness. That we may not be accused of exaggerating the extent and frequency of such insinuations as these, let us just take only the *last number* of each set of the Reports now in course of publication¹, and see how often, within *less than one year*, suspicion or absolute discredit has been thrown on different published statements of cases, by Judges, or counsel, or reporters. Most of the instances, we admit, will be found to apply to the reports of former times only, of which it may be said, that, as they cannot be made better, they may as well be left alone, and that it is unfair to draw from them an argument against their successors of the present day; but (besides that, as will be perceived, some of our extracts relate to very recent reports,) we think we are entitled to show by this means what mischievous and absurd effects the system now in force is, from its very nature, liable to produce; and besides, who shall say to what a pitch the ingenuity of the advocates of future ages may carry the art of critical scepticism, or how far those of to-day may be deterred from exercising it, merely by a feeling of respect for the living authors?

Here follows our list: —

Clark and Finnelly's Reports, vol. xii. (last 200 pages.)

P. 702. (George Atkinson, *arguendo*.) The case of *Clark v. Calvert* (3 B. Moore, 96.; S. C. 8 Taunt. 742.) is at best one of *doubtful authority*, for the contemporaneous reporters *differ materially* in their *statements of the facts*, and, judging by the *discrepancy* in the marginal notes, in their views as to what was the legal effect of the *judgment*.

¹ That is to say, of a *great many* sets; we will not be so bold as to say that we have examined *all*.

Phillips's Reports, vol. ii. part 2.

P. 206. (Rogers, *arguendo*.) "In *Del Rio v. Vallego*¹, it appeared from the *Registrar's Book* that there were *other* obvious grounds on which the demurrer had been overruled;" i.e. that the grounds stated in the report were not the true grounds of the judgment.

P. 211. (Lord Chancellor.) "As to what Lord Eldon is *supposed* to have said (in *Birmingham Canal Company v. Lloyd*, 18 Ves. 515.) he *could* only have meant that, &c. &c. . . . Lord Eldon *cannot have meant that*—"

P. 240. (Lord Chancellor.) "Much may, no doubt, be said against the accuracy of many of the reports in Dickens."²

P. 250. (Note on *Wright v. Naylor*, 3 Peere Williams, 152.) There seems to be *some inaccuracy* in what is *attributed* to Lord King by the report of this case . . . for on reference to the *Registrar's Book*, it appears, &c.

P. 251. (Note.) "In Cox's report (of *Orby v. Hunter*, 2 Cox, 242.) it is stated that the infant was entitled, &c.; but in Mr. Jacob's note of it, which is *correctly* extracted from the *Registrar's Book*, that circumstance does not appear."

P. 323. (Note.) A fresh report given of a case (*Dobson v. Lyall*) on the ground that the statement of it in 3 Mylne & Cr. 453. n. might lead to misapprehension.

C. P. Cooper's Chancery Cases, vol. i. part 3.

P. 479. (Note.) "Atkyns (in *Prince v. Heylin*) *must have misapprehended* what Lord Hardwicke said."

P. 518. (Note.) "Lord Redesdale has said that the 'Chancery Cases' are very incorrect; and Lord Manners has said the book is one of very doubtful authority."

P. 528. (Note.) "*Wheeler v. Trotter* (3 Swanston, 174. n.) is printed by Mr. Swanston from 'Sir Clement Wearg's MSS.' The case *could not* in the lifetime of Sir Clement Wearg have made any part of a collection bearing his name, as it was heard by

¹ This case is not reported in a book of Reports strictly so called, but in a text book (Mitford's *Treatise on Pleading*); but that is immaterial to the argument, as an established text-writer is considered quite as good authority as a reporter.

² With respect to the case before him, however, his lordship considered that the report might be trusted.

Lord Talbot, Trinity Term, 10 Geo. II. (1736), when Sir Clement Wearg had been in his grave nearly ten years."

P. 560. (Note on *Jones v. Jones*, 3 Atkyns.) "Atkyns informs us Lord Hardwicke said, &c. . . . *If Atkyns be correct*, all parties would be at liberty, under that order, to examine witnesses again. . . . Can any practitioner credit that such a chancellor as Lord Hardwicke *ever made* an order allowing of such a course?" &c.

Hare's Reports, vol. v. part 3.

P. 451. (Note on *Stone v. Theed*, 2 Bro. C. C.) "Comparing the Registrar's Book with the report, a doubt may arise whether Lord Thurlow *intended* that the decree should be, as it *was*, finally entered. The report in Brown is *confused*, and the marginal note is *incorrect*. . . . The concluding words of the report are *not very clear*. The passage *should probably* stand thus," &c.

Collyer's Reports, vol. ii. part 4.

P. 626. (Note on *Smith v. Green*, 1 Coll. 555.) "To the minutes of the decree in that case *as reported*, add the following," &c.

Robertson's Reports, vol. i. part 2.

P. 412. (Sir H. Jenner Fust.) "*Powlet v. Freak*, Hard. 111. is evidently *not well reported*."

Ibid. *House and Downs v. Lord Petre*, 1 Salk. 311. "This purports to be a report of what occurred in the Court of Delegates; but to all who are conversant with the practice which obtained in that Court, it is well known the reporter *must have been indebted to another* for all the information he had in respect of the decision. . . . The abstract of the case, *as reported*, is," &c.

Bail Court Reports (Saunders & Cole), vol. i. part 4.

P. 223. (Cowling, *arguendo*.) "*The King v. Reader*, 1 Stra. 531., which is the only authority, is an *exceedingly meagre report*, and *can scarcely be called an authority*."

De Gex's Bankruptcy Cases, vol. i. part 2.

P. 315. (Note.) "The Lord Chancellor said that he wished to make an observation upon a statement *reported* to have been made at a former hearing of the case (p. 56.), &c. . . . The state-

ment must have arisen from a *misapprehension* of the counsel or of the reporter."

Dowling and Lowndes' Practice Cases, vol. iv. part 3.

P. 386. (Burnie, *arguendo*.) "The case of *Lloyd v. Jones*, as reported in *Meeson & Welsby's Reports*, is certainly an authority against the plaintiff; but if the report of the same case in *Dowling's Practice Cases* be the correct one, there was a good ground for holding," &c. (Patteson, J.) "It seems to me that the report of *Lloyd v. Jones* in *Meeson and Welsby* must be the correct one; for the judgment in the report of *Dowling* proceeds on the ground," &c.

Thus, on no less than *sixteen* different occasions, within the very confined period to which we have limited ourselves¹, have doubts been thrown on the *mere correctness* of different reports; that is, doubts whether they are or are not accurate representations of what was said or done during the progress of the cause; besides this, our system, with an almost prodigal liberality, allows of doubts whether the judgment be good law; doubts whether this or that remark was judicial or extra-judicial; doubts whether a decision was founded on

¹ We have preferred giving these instances to making a selection of more striking ones from a wider range; for an argument like ours is generally only weakened by any attempt at selection of instances, which the reader (not perhaps without reason) is apt to suspect not to be a selection at all, but the whole case; instead, therefore, of giving what might appear a weak induction, we have thought it better to give a nearly exhaustive induction from a very small portion of the whole subject, and to appeal (as we do very confidently) to the experience of our learned readers to say whether that is not a fair specimen. Those who wish for a further collection of examples may consult Mr. George Farren's "Handbook." After what we have just said, we will not adduce the following extract from Mr. Twiss's "Life of Lord Eldon" as part of our argument; but we cannot resist laying it before our readers for their consideration:—"To Lord Eldon's retentive memory of law, Lord Thurlow's fame is much indebted. It is chiefly in Lord Eldon's judicial reminiscences of that great lawyer, that he is seen to his due advantage. His reported judgments are for the most part very imperfectly executed, and Lord Eldon may be said to have been in person the main depository of the law of Lord Thurlow's age." (vol. iii. p. 464.) The statutes of a whole reign falsified, and not trustworthy unless they are verified by (not even the notes but) the retentive memory of a subsequent Judge!! This may or may not be strictly accurate; but what can be said in defence of a system which is open to such imputations?

this or that circumstance; doubts whether a case has been overruled or can be "distinguished;" doubts in such infinite and ingenious variety, that after spending a few hours among the Reports, the bewildered law-hunter finds himself in such a hopeless maze of utter stupifying scepticism, that he almost begins to doubt, with Byron, whether "doubt itself *be* doubting;" — but with all these doubts we have nothing at present to do, except so far as they justify us in observing, that there are elements enough of confusion and difficulty in our legal system already, without the gratuitous addition of this crowning and all-pervading stroke of mystification, which makes our Courts, like Milton's Chaos, "by deciding" only "worse embroil the fray." It is like giving a man a guide through a labyrinth, with a warning that he can only be trusted where there are no turnings; or sending a sailor to sea with a compass which is not to be believed unless its indications can be verified by other observations. The law depends upon the cases; but *what the cases are* we can never with certainty affirm.

Surely this is carrying to caricature point those qualities of "flexibility" and "adaptability to circumstances," *i. e.* uncertainty, which some respectable and respected persons look at with affection and pride in our jurisprudence, and desire to see preserved to us. Granting even that we ought to leave every thing indefinite so long as we keep in the abstract, yet when we come to the concrete, when we are driven into a corner, and an actual case has arisen which must be decided one way or the other, simple folks might perhaps imagine that *that* point at least was about to be settled for ever, and one more plot of firm ground redeemed from the ocean of confusion. But, no! The law is ferretted out, sifted, discussed, examined, and finally recognized, with infinite labour and ingenuity both of bench and bar, it is true; but we take care that the glorious element of uncertainty shall remain to us notwithstanding — all this must be done *without prejudice* to our right to open up the whole question again at the very next opportunity; and so we contrive that the result shall *remain unrecorded*, or at best shall be only recorded in a way so unauthentic that anybody here-

after shall be at liberty to accuse the record of inaccuracy, or explain it away, or altogether repudiate and deny it!

What if *Parliament* should act in a similar manner? What if, after a bill had been brought into the Commons, read a first time, read a second time, committed, read a third time, carried through as many stages over again in the Lords, and finally ratified by the Royal assent, Parliament should take no further care of its offspring, and should leave the public to find out what the laws were as well as it could, out of the reports in the "*Times*!" Imagine the Parliament Rolls being open to the same style of criticism as is now applied to the Law Reports, and the claimant of an estate suggesting that there *must be some mistake* in the engrossment of the Statute of Limitations, or a convicted housebreaker contending that the Crown *could not have meant* that so trifling an offence as burglary should be punished with transportation!

The mere statement of a system which is on the face of it so unreasonable and so inconvenient, should carry, one would have thought, its condemnation with it; and we have more than once, while writing the foregoing remarks, been afraid that we were but weakening the force of the conviction we desire to create by any attempt to amplify or illustrate an absurdity which no ingenuity or eloquence of declamation could enhance. But John Bull, we remembered, though active-minded enough in some respects, is singularly apathetic in others; he tolerates long-established nuisances, with an amiable stupidity that is almost touching; he won't see them until he is obliged, and then he declares that he likes them rather than not; moreover, he is a practical man, and does not care a pin for neatness or consistency, provided he has the means of doing *somehow* what he wants; and thus we find that a practice, which it seems to us almost like "gilding refined gold," to ridicule and condemn, has not only been endured with scarcely a murmur by the whole legal profession for some centuries, and has even found its apologists!

Blackstone, we are glad to say, is with us: —

"The decisions of Courts," he says, "are held in the highest regard, and are not only preserved as authentic records in the

treasuries of the several Courts, but are handed out to public view in the numerous volumes of Reports which furnish the lawyer's library. These Reports are histories of the several cases, with a short summary of the proceedings, which are preserved at large in the record; the arguments on both sides, and the reasons the Court gave for its judgment, taken down in short notes by persons present at the determination. And these serve as indexes to, and also to *explain*, the records, which always, in matters of consequence and nicety, the judges direct to be searched. The Reports are extant, in a regular series, from the reign of king Edward the Second inclusive, and from his time to that of Henry the Eighth were taken by the prothonotaries, or chief scribes of the Court, at the expense of the Crown, and published annually, whence they are known under the denomination of the Year Books. And it is *much to be wished* that this beneficial custom had, under proper regulations, been continued to this day; for, though King James the First, at the instance of Lord Bacon, appointed two reporters with a handsome stipend for this purpose, yet that wise institution was soon neglected, and from the reign of Henry the Eighth to the present time this task has been executed by many private and contemporary hands, who, sometimes through haste and inaccuracy, sometimes through mistake and want of skill, have published *very crude and imperfect* (perhaps *contradictory*) accounts of one and the same determination." (Commentaries, vol. i. p. 71.)

Candour, however, obliges us, though with regret, to add that Mr. Serjeant Stephen, in his new Commentaries (vol. i. p. 49.), though he incorporates with his text part of the above quoted passage, yet omits the expressions of approbation of the attempt to restore the authorized reporters, and the remarks on the evil effects of the existing system; from which, we fear, we must infer that he does not agree with us and his great Father (*nos et Rex noster*) in this matter. This mere negative support, however, is nothing compared to the bold devotion with which that work so much more often *referred to* than *cited*, we mean our excellent friend, the *Law Dictionary*, (article "Law Books,") rushes in to the rescue, and declares, with reference to Blackstone's animadversions, "This evil has, however, been since, in a great measure, remedied, by several periodical publications of reports of the cases determined in the courts of law and equity, soon after

the end of the terms in which they were decided. The public encouragement given to these works," continues the loyal writer, "seems a more adequate mode of reward than royal munificence could devise, even in a reign distinguished for the patronage of learning and genius. And there is now every reason to expect that a plan so well supported will continue to be adopted, so long as it shall please Providence to preserve law and the courts of law in Great Britain." We need scarcely observe, that the real question is, not what is the most adequate way of *rewarding a bookselling enterprise*, but what is the best way of *ensuring the authenticity of the reports*, so long as it shall please Providence, &c.

But let us just inquire, *what is a Report?* Can any one tell us how it is created, or what are its conditions? Is *any* note, taken by *any body*, a report? It would seem so. On the other hand, will any amount of solemnity in the preparation make a report unimpeachable? It would seem not. Is *publication* necessary to constitute it an authority? No: a manuscript case is, or may under favourable circumstances become, more than a match for the best printed and most widely circulated decision in the books. Pure gold may be found in a dunghill; a coin from the Bank may be pronounced a forgery. A piece of bad law, like the "false Archimage" of some Gothic romance, may for long years assume the outward semblance of the rightful prince, be clothed in purple, be received with honour and reverence by the judges of the land, and dispose of the lives and fortunes of thousands; till, at the appointed hour, forth steps the fated avenger from the mysterious cavern of some manuscript note-book, where he has been biding his time in an enchanted sleep, touches the impostor with the spear of truth, and, hey presto! the spell is broken, the true heir is restored, and down tumbles the usurper, dragging with him all his friends, followers, and dependants, in utter confusion and dismay! How pleasant it must be for men of fortune to reflect that the tenure of their estates may depend on the chance turning up of the worm-eaten commonplace book of some fourth-rate old lawyer, whose statement of a point of law no one, perhaps, would have relied on for a

moment in his own day, but which becomes most important and trustworthy by the time it is a hundred years old!

This is not very likely to happen, certainly; still, we say again, it is a contingency which our system admits of. And let us not be told that our declamations apply only to the old reports, and that it is practically well known which of the present publications are admissible or trustworthy, and which not. The old, it is well known, have every one of them their special character, and range through all the degrees of credibility, from nearly infallible to very doubtful; and it is not unlikely, that after they have been sufficiently tried in the furnace, each of the new, also, may hereafter have its allotted place in the scale; but, without attempting any invidious classification, we will now simply ask, whether any one will undertake to make out a list of what may be fairly called citable and quasi-authentic reports. What liberality of definition, even if it should include everything that is published in a blue-gray cover, would include such an authority as the following, to which, nevertheless, we find Mr. Justice Wightman thus giving considerable weight in a very recent case: "I am *fortified* in this view by the opinion expressed by my brother Patteson in a case of *Withy v. Gilliard*, decided in Hilary term 1842, *much relied on* in the argument, but *not to be found in any of the reports*, though a *short abstract* is given in a work called the Legal Observer, and which I *believe* to be correct."¹ The "Times" we may not quote — at least not without a little smirk and an apology; and is the character of the Law Journal and the Jurist very definitely settled? It is said, that they may with propriety be cited until the cases appear in the more regular reports, but afterwards not; a rather singular position, which would lead one to suppose that credibility might be for a term certain, and could be allowed to run down, like a watch. Then there are the American Reports: these, it seems, may not be used as *authorities*, but only by way of *illustration*, and as *backers* of an argument. How simple and satisfactory all this!

¹ See 4 Dowling and Lowndes' Practice Cases, 423.

Let us next consider the question in another point of view, which may, perhaps, reach the sympathies of some of our readers whom our former arguments have not affected. The voluminousness, number, and expense of the reports of the present day are becoming a perfect nuisance, which, as has been truly observed, has increased, is increasing, and must be diminished. Without meaning any disrespect to the gentlemen at present engaged in furnishing us with notes of the proceedings in the Courts, it is only saying that both reporters and publishers are mortal men, to say, that while the whole concern is a mere private speculation, of which the emoluments of course depend in a great measure on the quantity manufactured, the inevitable tendency of such a system must be to produce, and that it accordingly has produced, a style of reporting far more prolix, and a form of publication far more costly, than is at all requisite for any purposes except those above hinted at. Sometimes we have two rival sets of reports of the proceedings in the same court, both of which it is necessary to buy; and always, as all the reports of each court are published together, every man is obliged to buy infinitely more matter than he wants. Half the space in a real property lawyer's book-shelves is filled up with cases of common law and equity practice; and the special pleader must in like manner be encumbered with half a hundredweight of registration appeals and settlement cases¹; sometimes (though not often, it must be owned) an important decision dies, and makes no sign; often, very often, unimportant ones are recorded, overlaid with "an infinite deal of nothing;"—and, in a word, to wind up this part of our subject with an argument "adapted to the meanest capacity," a complete set of the English Reports alone now costs about 25*l.* *per annum*, and, with the Irish, *little less than 30*l.**; being somewhere about *one-sixth* of the average income of those crowds of ardent and laborious pilgrims who are now struggling about the base of that steep and long and slippery mountain, that has a woolsack at the top of it!

¹ Some advance in the right direction has recently been made in this respect by the separate publication of *Railway Cases, &c.*

Having thus, we hope, demonstrated that the present mode of reporting is absurd, and, what is worse, inconvenient, and, what is worst, expensive, let us shortly state the system which we desire to see established in its place. We shall be able to do so in a very few words; we have nothing striking or original to suggest; we hope, indeed, to gain some converts to our proposal, by observing that it is but a return to the ancient practice, as described by Blackstone in the passage we have already quoted. Let there be one, or, if found necessary, two reporters attached to each Court; they should be barristers, and be paid by a fixed salary, and have under them one or two short-hand writers. Let the Judges trying the causes point out what cases, or parts of cases, they consider proper to be reported¹; of these, let the reporters work up complete but concise statements; for this purpose they should be entitled (not by courtesy, but of right) to have copies of the judgments (when written), and to inspect the Judge's notes, the briefs, and all other documents produced or used in the course of the trial. Let these reports be then *revised* by the judges who heard the causes, receive their *imprimatur*, and be solemnly enrolled in the archives of the Court, the correctness of which no one of course would be at liberty to impugn. Copies should then be printed by the authorized printer to the Court, in as cheap a form as practicable, and it should be distinctly understood, that no cases would be allowed to be cited in court except those thus sanctioned, and as thus reported; and that with respect to the cases left unreported, the Judges, in the exercise of their discretion, considered that it was not expedient that they should become precedents to be referred to on future occasions.²

¹ As the judges would often not be able to say whether a case deserved to be reported or not until it had reached an advanced stage, or even not until after its conclusion, the reporters should of course take full notes, in the first instance, of *all* that passes in court.

² To any of our readers who should consider that such a power of suppression ought not to exist, we recommend the following revelation from Lord Campbell's "*Lives of the Chancellors*" (vol. iv. p. 458. note): — "Harcourt seems to have given mortal offence to Vernon the reporter, who practised as a counsel regularly before him, but *spitefully suppressed* his best decisions, and gives doubtful ones. See 2 Vernon, 664—688. . . . When I was a *Nisi Prius* reporter, I had a drawer marked *Bad Law*, into which I threw all the cases which

In this stage of the question, and in a paper which, as our readers will easily perceive, is written merely in the hope of calling the attention of others possessed of more practical influence than ourselves, to the evils we complain of, and without any pretensions of being a complete and exhaustive treatment of the subject, it would be idle to enter into any details upon our plan, particularly as we really feel convinced (as the railway prospectuses in the good old times used to say) that "the line presents no engineering difficulties whatever:" we would, however, just make one suggestion, which even our present reporters might avail themselves of with advantage, to the public at least, and possibly to themselves also; it is this: that each case, as soon as the report of it is complete, should be published forthwith on a separate sheet or sheets, as is now done with the acts of parliament, without waiting till others accumulate in sufficient quantity to make up a number; this would both enable us to get the reports earlier, and to get the reports we want, without being obliged to take with them those which we do *not* want. The benefit of such a practice would be particularly felt in the case of appeals.

To our new plan of reporting it has been objected, that, if the Judges are to be absolutely committed to whatever is attributed to them in the Reports, and are to be debarred from the convenient resource of being allowed to repudiate whatever bad law or imperfect reasoning may chance to slip from them, they will become so chary of their reputations, that, rather than run such a risk, they will leave off giving reasons for their judgments, or otherwise discussing the law, altogether, and confine themselves to barely pronouncing the decrees of the Court in favour of plaintiff or defendant. Now, if it is really to be apprehended that the Judges will do this, the objection, we must admit, is a most serious one. We have already expressed our respect for the old maxim, "*Lex plus laudatur quando ratione probatur,*" — our conviction, in fact, that,

seemed to me improperly ruled." We see, therefore, that a power of suppression does now subsist in full force; and indeed it is obvious that a discretion in the matter ought to, nay must, be allowed to somebody; and the only question is whether that *somebody* shall be a reporter, "spiteful" or otherwise, or the Court itself: a question to which it seems to us that there can be only one answer.

unless it be so proved, it can scarcely be lauded at all, but is little better than an oracular puzzle, dead, dry, and unsatisfactory; and we would sacrifice almost any thing, even a pet project, if its immolation were necessary to secure the continuance of so desirable a practice as the free statement by the Judges of the grounds of their judgments. But we cannot believe that the Bench would act so unfair and pusillanimous a part as that suggested. The principle, the condition of the common law, is that of self-development; its increase takes place, not so much by external application as by its own internal energies, exerted in modes arbitrary and irregular indeed in appearance, yet in accordance with the general law which governs the whole mass. In this process of self-development the judges are the principal agents; they are (to vary our simile) like the zoophytes of the coral reef, and it is their appointed task, by digesting, by assimilating, by working old materials into new combinations and modifications, to extend and improve the domain of law: they owe it to the public and to posterity, to add something to the common stock of learning and practical wisdom. These are as much the constitutional office of the Judge, as the settling of a dispute between two litigants; and we do not hesitate to say, that he who should confine himself to reading the pleadings, listening to the argument, and deciding for plaintiff or defendant, would be neglecting one half, and the most important half, of his duty. We cannot, therefore, admit the supposition on which the objection is founded; we cannot allow that it ought to be presumed (it would indeed be a piece of *presumption*, and a very insolent one,) that either childish vanity or anile caution will tempt the Judges of England to shirk their allotted share of the toil and responsibility of working the social machine.¹

¹ In *Wight v. Ritchie*, Lord Eldon observed, that "It was always useful to state the reasons which influenced the mind of the Judge in giving judgment. If pronounced by a Judge from whose decision there lay an appeal, counsel, and the advisers of parties, had an opportunity of weighing well the grounds of the decision; and when the matter came to the court of last resort, where the principles were settled which must regulate the decisions of inferior tribunals, it was their duty to consider all the principles to which facts in all their varieties might afterwards be applied." (2 Dow, 383.) And again in *Butcher v.*

But again, it may be said by those who are ready to cry "a job" whenever patronage is given to any public officer or department, that the appointments will be made a provision for Judges' younger sons; and that the reporters, being paid by a fixed salary, and enjoying a sort of monopoly, and therefore freed from the strong necessity for producing good reports, arising from the fear of rivalry and direct pecuniary interest, will gradually become more and more negligent of their duty, until the office at last sinks into a mere sinecure. To this we answer, that the reporters' duties will be far too constant, and far too important to, and closely watched by, both the bench and the whole body of the profession, to allow of their being long neglected, or performed in a slovenly manner; and (if it *must* be presumed that "honourable men" need the incitement of purely personal motives to tempt them to do their duty) we may add, that such might still be found in the notoriety and position in public estimation which the character of reporter always gives to a barrister. The fear of jobbing, therefore, in the sense that incompetent persons will be appointed, may, we think, be

Butcher, the same great authority said, "Upon a subject which has been so much the topic of discussion and decision, it would be a waste of time to trace the doctrine from beginning to end through all the cases, *as has been my habit*; which I hope will produce at least this degree of service, that I shall leave a collection of doctrine and authority that may prove useful." (1 Vesey & Beames, 96.) For the above extracts we are indebted to Mr. Twiss's "Life," vol. iii. p. 451. We must not, however, conceal that unfortunately some support for the supposition that the Judges would refuse, like Falstaff, to give their "reasons" upon this sort of "compulsion," is to be drawn from the custom of the Common Law Judges to return merely a certificate, without reasons, in answer to cases sent to them from Courts of Equity. To this we can only answer that it is an exceptional case; that the practice originated in a sort of huff, because Lord Eldon, when chancellor, "so carped at the reasons of Lord Kenyon and the other Common Law Judges, that they refused to do more than simply to give an answer in the affirmative or negative to the questions put to them" (see Lord Campbell's Lives of the Chancellors, ("Eldon,") vol. vii. p. 135.); and that the inconvenience of it is so universally felt and acknowledged, as to be a complete confirmation of the justice of our general remarks on the subject; and that, therefore, there is but little fear that it will be extended beyond the circumstances to which it is at present confined. It is, on the contrary, much more probable that the Judges will return to the "excellent custom" (as Lord Campbell truly calls it) of giving reasons, introduced by Lord Eldon while Chief Justice of the Common Pleas.

dismissed; as between competent persons, no doubt, favouritism *may* be shown, as it may be, and is, in most other transactions of life; and not a few of our readers will, perhaps, add, *quite right too*; we will leave our opponents the full benefit of this objection. After all, one must trust *somebody*; and the character of the British Bench for integrity is generally considered, we believe, to stand pretty high. Besides, are we quite free from the risk of jobbing under our present system? We *have* heard whispers of a sort of *tenant right* claimed in the blue-gray cover of an old-established series — of a retiring reporter receiving something like a *consideration* for the good will of the business and connexion — of a little partiality shown in the admission of junior partners to the various firms. All this, however, by way of retort rather than of attack. As to the advantage of *rivalry*, and the propriety of encouraging it in these matters, we confess we are sceptical; it seems to us that it does more harm than good. The scramble for cases; the unseemly race to be “out first;” the favour shown to one set of Reports, and denied to others; with their necessary consequences of hasty and inaccurate reporting, mistrust and ill-feeling — are great and acknowledged evils, resulting from the present system of free competition, and which are not, in our judgment, compensated for by the only benefit it can produce, that of stimulating the vigilance and activity of the reporters. As we have shown, there is a sufficiency of other stimulants to exertion, independently of this; and we believe that a well-regulated and *well-watched* monopoly, such as we are advocating, would be a far better thing for the public.

The power, again, with which we propose to invest the judges, of removing a reporter who should neglect his task, and of immediately appointing his successor, would have a very beneficial effect. Now, it not unfrequently occurs, that as a reporter advances in his profession, and begins to have other avocations, he loses his anxiety about his Reports; if not carelessly done, they at all events get in arrear; and he may all at once throw up his office, leaving his publisher and the public in the lurch. We sometimes have to wait for

years before we can get a good report of a material case; and now and then a complete "solution of continuity" occurs in the history of the doings of our courts. All this would be avoided under our new system by the authority and right of superintendence given to the Bench.

It may be urged that the Judges will become less deliberate and cautious in their decisions, or, at all events, in their language, if the fear of "a chiel among them" taking unsuppressible notes, is removed. We are not, as we have already hinted, of those who hold that nothing but selfish motives, or a fear of detection, will induce men of high station and established character to do their duty; but, admitting to the fullest extent the desirableness of giving entire publicity to the proceedings of the courts of law, we must contend that such will be secured in all its integrity under our proposed system. In the first place, there will, of course, be, as before, the presence of the Bar and the public; and in the next, there will be nothing to prevent any one who thinks proper to do so, from taking and publishing his own reports of the cases, either in the newspapers or elsewhere; which, it should be observed, would have just as much authority as the present reports have — namely, the individual character of the reporter or of the publication in which they might appear — to support them; and which (though not allowed to be cited in court for legal purposes) would still have their full value as *evidence* to convict any Judge of ignorance or improper conduct. If it be said, that such reports would not carry weight because their accuracy might be denied, we answer, *so may that of any of the existing reports*: so that, at all events, we should be no worse off than we are now. And, while we are on this part of the subject, we may mention one more bad effect of the entire independence of the reporter, and his want of connection with the Court, of which Judges have been heard, and with no little reason, to complain: it is this: that everything that falls from their lips is in an instant snapped up, written down, carried off, printed and published in a provokingly and unfairly literal way, which gives anything but a correct idea of the general views of the speaker, and is positively inaccurate, through a too great pretence of accuracy. When

we consider the free and almost colloquial tone in which points of law are often discussed between the Bench and the Bar, we must feel, that to treat every sentence that escapes a Judge in the course of the *debate* (as it may almost be called) as a deliberate judicial dictum, and to run away with it and thrust it into a report, "without with your leave, or by your leave" (as the saying is), without giving the reclamitant author an opportunity of modifying or explaining it, or allowing him to say whether he intended and desired that that should be taken as a well-weighed and final expression of opinion or not, is to subject the Judges to an ordeal which no human intellect can stand, and to which they ought not, in fairness both to themselves and others, to be exposed. We believe their lordships would consider immunity from this species of annoyance cheaply bought at the price of the additional trouble of revision and correction which our plan would entail upon them, and which it has been suggested that they might refuse to undertake—an objection rather nominal than real, however, as it is well known, that, in point of fact, the Judges do now very commonly revise the reports of their decisions before publication.

But we need not carry any further this game of "Objections" and "Responses." We do not, of course, pretend that the plan we have proposed is altogether perfect, and that no faults can be found in it which, taken by themselves, may not have some weight. But we *do* contend that our new régime would be a very great improvement on the old one; and should these few and desultory observations succeed in calling the attention of that part of the public whom it concerns to the objections to, and the arguments in favour of, the two systems, our object will have been attained; and we have but little fear as to the result.

To tell the truth, however, there is one sort of opposition, and a more solid and stubborn one than that of argument, which we do look forward to with some apprehension; indeed, when we think of the vast dimensions and numerous garrison of the (paper) castle against which we are now (from a convenient distance) shaking our solitary sword, we own we almost feel aghast at our own temerity; and are half

tempted to fall back upon the consolation of the decayed gentlewoman, who, being reduced to cry muffins in the streets, comforted herself with the hope that *nobody would hear her!*

ART. II. — THE COUNTY AND SUPERIOR COURTS.

THE mode of administering justice in the new County Courts presents a contrast so striking to that in use at Westminster Hall, as to suggest some very serious considerations. It is difficult to admit the necessity of applying in one Court a highly artificial procedure to adjudicate upon a class of cases, and acknowledge at the same time they are satisfactorily disposed of in another under a process of the simplest possible description. That this difficulty is forced upon us by the present state of the law, it will be scarcely possible to deny. If we enter in term time the Superior Courts of Common Law we find a formidable array of counsel engaged in arguing points of pleading practice and evidence of terrible significance to the suitors there, but which those in the Inferior Courts are permitted to disregard altogether; and as the matters decided in the respective tribunals often differ only to the extent of a few pence in the sum sought to be recovered, we are tempted to imagine that the refinements of the superior tribunals must be vexatious and expensive mockeries, or that justice as administered in the Inferior Courts exists only in name.

We must, however, bear in mind that the new County Courts were established more for the purpose of dealing summarily with undisputed claims than for settling *bonâ fide* litigation. It was well known that a fearful expense was cast upon plaintiffs and defendants by applying the process of the Courts above to the recovery of small sums which the defendant did not dispute his liability to pay, but which he could not immediately discharge. It was thought that much good would be done if such cases could be at once adjudicated

upon at little cost, and without form or ceremony ; and it was, doubtless, imagined that the County Courts would effect all this. It was not in the contemplation of the legislature to bring within their jurisdiction the decision of any important points of law, or to make any serious inroad upon those principles of jurisprudence which are the growth of centuries, and which demand extraordinary intellect to master and apply.

It remains to be seen, however, by its ultimate results, whether the mode in which *bonâ fide* disputes are disposed of in the County Courts shall confirm or disprove the necessity of adhering in the Superior Courts to the forms of pleading and the rules of evidence now so rigidly observed there. The experiment is in progress, and we do not propose here to prophesy its result. The main object of the present article is to consider the new forms of procedure with reference to the enforcement of debts, and to show how far the alterations they have brought about are or are not beneficial to the suitor. We believe it will appear that they are more useful when applied to disputed cases, than to those which present nothing for settlement but the time of payment, although to meet cases of the last description was the main object of the framers of the bill.

To judge correctly of the value of an alteration we must have an accurate idea of the matter as it originally stood ; and we propose, therefore, to describe as concisely as possible what was the course of proceeding in enforcing payment of small debts before the County Courts Act came into operation, pointing out the alterations it has effected in each step as it is brought before the reader's notice.

A plaintiff, under the old system, handed over the matter to his attorney, who filled up in his own office a writ, which, with the "præcipe" annexed, was taken to the proper officer of the Court out of which the process was issued, who, retaining the præcipe to be filed, returned the process stamped, a copy whereof would afterwards be served upon the defendant with the amount of debt and costs endorsed, and a notice that if the same were paid within four days all proceedings would be stayed. If the copy of the writ was

defective in any of these points it could be set aside, and the defendant, notwithstanding payment of the costs claimed, might have them taxed if he thought proper.

In proceeding in the County Court the plaintiff must, at his own expense, either in person or by proxy, proceed to the Court for the district where his debtor resides, provided it be not more than twenty miles distant; he must then furnish the clerk with particulars of his debt, who, thereupon, fills up a summons, a copy whereof is afterwards served by the bailiff on the defendant, the plaintiff paying certain fees, and receiving a note stating when the cause will be tried. The day fixed is generally four or five weeks from the date of the summons. The case then rests until five days before the hearing, when, if the defendant think proper, he can pay the debt and costs into Court and put an end to the proceedings.

The alteration effected up to this stage of the proceedings (and most of the actions for debts under 20*l.* there terminate) is most strikingly to the disadvantage of the creditor, and saves but little expense to the debtor. Instead of sending a note to his attorney, and having his money brought to him in his counting-house at the end of a week, the creditor has to go or send at his own expense to the district Court of the debtor, if within twenty miles of him, to obtain a summons. He will then have to wait some weeks before he can take another step, and if, at the end of that time, he be lucky enough to hear the money is paid into Court, he again makes his appearance there, and if he happen to have the necessary documents about him to enable him to receive the money, it will be handed over to him with all due respect and solemnity.

There would be something to reconcile the suitor to these peripatetic labours if the extra trouble thrown upon him relieved him of the expense that attached to the old easy plan of suing a debtor. The most galling part of the matter, however, is, that he has to pay nearly as much in hard cash, in the shape of fees, as he would have had to pay to his attorney for issuing a writ in the Superior Court, and relieving him from all trouble in the business.

It will not do to treat the loss of time to which the creditor is thus exposed as a light matter, when it is borne

in mind how widely scattered are the various metropolitan Courts, and that in the country districts the plaintiff must travel to that in which his debtor resides, though it involve a journey of twenty miles. Plaintiffs are beginning to feel this grievance severely, and we know that many demands have in consequence of its existence been abandoned altogether.

The issuing of the summons in the County Courts is a return to the ancient practice in the Superior Courts, long since abandoned as a matter of convenience to suitors and officials. Formerly the attorney presented to an officer of the Court the "præcipe" containing the names of the parties and the cause of action—answering to the "plaint" given in by the suitor in the County Court. It was the duty of the officer receiving the præcipe to make out the writ as it is now the duty of the clerk of the County Court to make out the summons on receiving the plaint. In course of time the attorneys, who knew perfectly well how the writ ought to be framed, filled it up beforehand, for the sake of expedition, and the officer of the Court, willing enough to be relieved from trouble, stamped as authentic the process drawn by another hand. In the County Court this convenient arrangement has not as yet been sanctioned; and instead of there being one central office, whence writs can be issued into every part of the kingdom, the County Court Act renders it necessary for the suitor to go to particular Courts, at the inconvenience and expense we have already adverted to.

To show the advantage, in the scale of expense, of one tribunal over the other, we subjoin the costs of a writ in an action under 20*l.*, and the expense of a summons for a debt of 15*l.*:—

<i>Superior Court.</i>				<i>County Court.</i>					
		£	s.	d.		£	s.	d.	
Instructions	-	-	0	3	4	Fee for summons and service	1	2	6
Writ of summons	-	-	0	12	6	Time within which action to be settled			
Bill and copy to endorse	-	-	0	2	0	after issuing summons, four weeks.			
Copy and service	-	-	0	5	0				
Fee ending,	-	-	0	3	4				
Letters, &c.	-	-	0	2	0				
			1	8	2				
Time within which action to be settled									
after service of writ, four days.									

The fees paid on issuing the writ in the Superior Court are 5s. 3d., and the service on the defendant must be personal. If the legislature had reduced the outlay for stamping the writ, and given the same facilities for service as have been granted in respect of summonses issued under the County Court Act, the cost of a writ in the Superior Court, and the whole settlement of the matter through an attorney, might have been reduced to 1l.—being less than the fees now paid by the suitor in the County Court, independent of the pecuniary loss he may suffer in the shape of waste of time or travelling expenses.

We have, we think, clearly shown that where the action does not proceed further than the first stage, the creditor would find it to his advantage to proceed in the Superior rather than in the County Court. We now come to consider the effect of the altered procedure in cases where the defendant, being unable to pay the debt, leaves the matter to take its course, offering no resistance whatever to the demand.¹

In such cases the advantage of the old over the new form of proceeding is more manifest than in those suits which are settled at the outset.

In the Superior Court, at the end of eight days after service of the writ, the plaintiff delivers to the defendant a declaration, to which the defendant must plead in four days, and if he fail to do so, judgment is signed against him. The costs are greatly increased by this proceeding, as we shall show hereafter, but the suit is ended, and the plaintiff has not been called upon to sacrifice one moment of his time, or to put himself to any inconvenience or expense in proving his demand. In the County Courts, however, the case is very different. On the day appointed for hearing, he must go prepared to prove his case, although the defendant may not have the smallest intention of requiring him to do so. He has no means of knowing beforehand whether it is to be

¹ It has been proved by returns obtained to ascertain the fact, that out of some thousand cases brought into the Superior Courts to recover debts under 20l., not two per cent. proceeded to trial.

opposed or admitted, whether he is to be met with every objection that ingenuity can suggest, or to be allowed to take a judgment without question or dispute. He must therefore be prepared for a contest, and the expense and annoyance of this preparation, and the vexation of finding that it has been unnecessarily taken, is enough to make many a suitor forswear altogether a course of proceeding that so needlessly gives rise to them.

Although the expense of obtaining a judgment in the Superior Court adds greatly to the costs of the writ, those of a hearing at the County Court add to the amount of the charges in nearly the same proportion: *e.g.*

*Cost of obtaining Judgment by Default
in Superior Courts.*

	£	s.	d.
Instructions -	- 0	3	4
Writ -	- 0	12	6
Bill and copy -	- 0	2	0
Copy and service -	- 0	5	0
Searching for appearance -	- 0	3	4
* Affidavit of service -	- 0	5	0
* Entering appearance -	- 0	6	0
Instructions for declaration -	0	3	4
Drawing -	- 0	4	0
Copy -	- 0	2	0
Rule to plead -	- 0	1	6
Particulars and copy -	- 0	2	6
Notice of declaration and copy and service }	0	4	0
Drawing final judgment -	- 0	3	4
Attending to sign -	- 0	3	4
Paid -	- 0	8	0
Entering on paper -	- 0	3	4
Like on roll and paid -	- 0	4	2
Bill of costs and copy -	- 0	3	0
Attending taxing -	- 0	3	4
Paid -	- 0	1	0
Term fee, &c. -	- 0	10	0
	4	14	0

* If the defendant appear, these items are not chargeable.

Time within which judgment obtained, fourteen days.

The like in County Courts.

	£	s.	d.
Plaint -	- 1	2	6
Subpoena -	- 0	2	6
* Loss of time, witnesses, &c. -	0	15	0
Professional attendance at hearing }	0	15	0
Court fees on hearing -	- 1	6	0
	4	1	0

* These expenses vary in every case, in some they might be much heavier, in very few would they be lighter.
Time within which judgment obtained, one month.

We will assume, that the defendant on appearing admits

the demand, and leaves to the decision of the Judge the only real question in the cause, viz. when is payment to be enforced. This, under the "*ancien régime*," was left to the forbearance of the creditor; and we doubt much whether he feels at all grateful to the Government for having transferred to other hands the prerogative of indulgence. The creditor may feel thoroughly persuaded that his debtor intends to use the time granted merely to make away with his property, but if the defendant can work upon the sympathy of the Judge, he can afford to set at nought his creditor's irritation, or even to provoke it, as the more it is exhibited the more likely will the Judge be to treat its object with indulgence. We are, nevertheless, not prepared to admit that the power conferred upon the Judge to grant time for payment, is injudiciously bestowed. That it may sometimes be injudiciously exercised there can be no doubt, and that it may occasionally aggravate the wrong a creditor endures from his debtor, is also pretty clear; while it is quite as clear that in many cases it may enable a debtor to triumph and exult over his injured creditor. These evils, though serious, are, as we think, counterbalanced by the good produced from enabling an intelligent and impartial person to give indulgence where the case seems really to justify it; and a relentless creditor, if left to himself, would exercise his rights with undue severity.

Thus far have we traced the course of proceeding under the new act, without finding much to congratulate ourselves upon in the shape of improvement. We have seen that the proceedings in undefended cases are much more dilatory than heretofore, almost as expensive in direct outlay, and that they inflict upon the suitor, in the shape of trouble and loss of time, a tax which he has personally to bear, and which is often heavier than all the authorised fees in the case put together.

We have now to consider the effect of the new act upon disputed cases, and are happy to be able to express a firm conviction, that more justice has been obtained through its operation, than the most sanguine advocates of the measure ever supposed it capable of administering.

We have placed side by side the costs of the Superior and the Inferior Courts up to the time of judgment by default, but here the parallel ends altogether. From the moment of a plea being delivered in the Superior Courts, the expenses begin to rise in a manner that would almost drive the suitors distracted, could they ascertain from day to day the exact state of the bills of costs. It is useless to go into detail; suffice it to say, if the action be tried before the sheriff, the costs are increased from about 4*l.* 4*s.* to 12*l.*, 15*l.*, or 20*l.*; while, if it be tried before the Judge of the County Court the expenses are not increased a shilling unless the case be adjourned for the production of further evidence.

The saving of expense, however, is not that feature in the matter, agreeable though it be, which we most admire. We are spared the pain of witnessing the failure of justice which so frequently results from a strict adherence to the highly artificial rules of pleading and evidence, which fetter the proceedings in the Superior Courts. The matter is discussed and disposed of in an easy off-hand style, exactly suited to the cases that are adjudicated upon. The examination of the parties to the suit often clears up at once circumstances which can only be got at in the Superior Courts by a host of witnesses, whose testimony is after all too frequently obscured by a long cross-examination, at once subtle and severe. The opportunity no longer exists for dishonest attorneys to make petty grievances the subject of ruinous expense to the luckless offenders; and the poor, on the other hand, are no longer shut out from obtaining satisfaction for aggressions committed against them by being mulcted in the shape of extra costs of the small damages awarded them. It is not too much to say, that many thousand cases have been satisfactorily disposed of in the County Courts since their establishment, which would have been given up altogether had the suitors been compelled to bring them before the superior tribunals.

We know that these advantages are not without their drawbacks. A great deal of petty litigation has sprung up, which it would have been better not to have called into existence. This, however, is but the weed which springs up in the healthy soil. A far more serious evil presents itself in

the perjury which is frequently committed by the parties to the cause: and which, although seldom successful, must be kept in check by greater care being taken to secure its punishment than is now manifested. This is the more important, as the liberty now given to the parties to give evidence in their own behalf, is that alone which prevents the County Court Act from being one of the most monstrous abortions that legislation ever produced. If the ordinary rules of evidence had been adhered to while the plaintiff was obliged to obtain at his own cost professional assistance to prepare himself with legal proof of his case lest it should be disputed at the hearing, the act would long before this have been obliterated from the statute book at the urgent and unanimous demand of the country.

The characteristics of the County Court Act are simplicity in its process and finality in its judgments. It would seem that the legislature had considered the preservation of these points, at all hazards, as indispensable to the success of the measure. We ourselves are of that opinion. It may be very true that the absence of all pleadings may occasionally produce uncertainty as to the issue to be tried; that the admission of interested testimony may sometimes give rise to perjury; that the absence of all power of appeal may compel a suitor to submit now and then to what may appear a tyrannical denial of justice; but the cases in which these evils are suffered, bear no proportion to those which receive the immense advantages the new system has secured.

It appears to us a fallacy to suppose that it is to the interest of the suitors for the courts of law to devote as much attention to small cases as to large. There is a French proverb that disposes of the whole question, "*Le jeu ne vaut pas la chandelle*;" and our space will not allow us to use any other illustration of the argument. We, however, believe that the provisions of the new act are susceptible of considerable improvement, and we will endeavour to show how, in our opinion, they may be advantageously amended.

To render the County Courts satisfactory to the suitor, he ought to be relieved from the burden of conducting his case in person. We have already shown the trouble and

expense imposed upon him in bringing it to a hearing, while the fee allowed for professional advocacy is, if he require it at all, insufficient to procure that assistance which he ought in justice to be provided with. We protest against this, not so much for the sake of the profession as for the benefit of the public. The interests of a class must at once give way to the welfare of a community; and if by a salutary reform the fees of the lawyers are diminished, to resist it on this account would be an act of the grossest selfishness and dishonesty. It is, however, idle to suppose that it is any advantage to a suitor to deprive him of the power of recovering costs fairly incurred in prosecuting his claim, and a moderate scale of fees ought at once to be arranged, which would enable claimants in the County Court at the cost of the defendant, to employ an attorney to manage the case throughout, if they felt it to be to their interest to do so. We press this point the more, as the County Court fees now charged amount to almost as much as the costs heretofore paid to the attorneys in return for services which the County Court officials certainly cannot boast of performing. Over and above the injustice done to the attorneys, the suitors find it most unsatisfactory to have their business transacted by public officers rather than by persons of their own nomination. There is something in the relation of attorney and client, which gives to the former an interest in the matter intrusted to him, and to some extent secures his attention thereto. This is not always so with the fee'd functionary, — he cares but little about the result of the proceedings — his duty commences and terminates with the issuing the process and receiving the official payment, and he leaves the suitor to work out the matter as he best can. The due payment of instalments after the hearing, according to the order of the Judge, is usually a matter of no concern to his officers, and the difficulty imposed upon the creditor by the Court receiving these periodical payments, while it takes no trouble to get them in, is already found to amount in many cases to a denial of justice. The Court now stands between the plaintiff and the defendant as an obstruction, in the place which

which the attorney formerly occupied, as the protector and enforcer of the rights of his client.

The necessity the suitor is now under to take his case to the district where the defendant resides is a nuisance so perfectly intolerable, that it is idle to suppose it can be suffered long to exist. A tradesman in Westminster can with much greater ease to himself sue a debtor living at Birmingham than one at Brentford. We shall not repeat what we have already urged upon this point. The mode in which writs are issued in the Superior Courts must sooner or later be applied to the new system, and the convenience of the creditor be consulted rather than that of the debtor in the question of jurisdiction.

The harassing and expensive necessity of being prepared with proof of every case at the hearing is one that arises out of the previous uncertainty as to whether the claim is or is not to be disputed. This might be obviated by requiring the defendant to inform the plaintiff beforehand what course he intends to pursue; but we should thereby introduce the system of written pleading, which it was the great object of the act to get rid of. We can only suggest as a palliative to the evils attendant upon the present state of things, that the Judge should have no power to grant time to defendants in any other cases than those where they had eight days before the hearing given notice to the plaintiff that they admitted the debt, and would submit to such terms as to payment as the Judge should impose upon them.

To check in some degree the perjury that every person who has witnessed the proceedings in the County Courts knows is almost daily committed there, we would suggest, that in all cases where the testimony of plaintiff or defendant conflicted, that the Judge should enter it upon his notes and require each party to affix his signature thereto, and that he should then require independent evidence of the facts upon which the parties differed. The deliberation involved in this mode of proceeding, and the preserving a record of the perjury which the guilty party would know he could never destroy, would, we think, prove a most powerful restraint against the commission of the crime. We would also

suggest that the oath of the plaintiff should never be taken in the absence of the defendant, in cases where he resides at a greater distance than twenty miles from the complainant. We know parties in London who have by leave of the Judge of a County Court, situated at a distance of three hundred miles, been called upon to appear there and answer a demand made against them. We have in our own mind a case where the demand was for 3*l.*, and for which there was as to a great portion of the claim no pretence; but by the advice of the clerk who was communicated with on the matter the money was paid, as it appeared that the Judge would not receive written statements, that no costs would be allowed for defending, and that the plaintiff's oath would be taken in support of the demand.

The most difficult grievance to deal with is the absence of the power of appeal. We feel that were it conferred the Superior Courts would be almost overwhelmed with applications upon matters which it would really be better for the party fancying himself aggrieved should not be disturbed. Still there is something almost intolerable in having to submit to what we consider legalized injustice. The feeling of indignation it arouses is one of the fiercest character, and will find some channel or other wherein to expend itself. If shut out from an appeal to a regularly constituted court of justice, a man will bring his case before one much less competent to judge of its merits, and the public at large will be called upon to sit in judgment on decisions which, from their being arbitrary, will be almost presumed to be unjust. We have witnessed all this actually take place in the metropolis a very few weeks ago, when we might have found a tavern turned into a court of appeal, and the Judges personified by a host of tradesmen who considered themselves aggrieved by the principle involved in the decision complained against.

The only modification that we consider can be safely recommended of the finality of the County Court decisions, seems to us to be the conferring upon the Judges themselves a power to reserve for the opinion of the Superior Court those points on which they themselves might feel a difficulty

or doubt in deciding upon. We believe that had such a power been possessed by the able and impartial Judge of the Westminster County Court, he would of his own accord have left the Superior Courts to decide the points that were urged before him in the case we have alluded to; and the defendant in *Lord Bury v. Clark* would thus have been spared the trouble and expense of calling a public meeting of the inhabitants of Westminster to consider his case, though he might, after all, have found but little pecuniary benefit or personal consolation from appealing to a higher tribunal.

In the foregoing remarks we have endeavoured to confine ourselves to the consideration of the practical effects of the new act, and have resisted as much as possible the temptation presented by the subject to discuss the principles upon which the practice of the Superior Courts is founded. We are satisfied that the experience of the profession and the public will justify the observations we have made upon the working of the new measure; and we must leave it to the future to show how far the suggestions we have thrown out for its modification and amendment would, if adopted, remedy the evils which are now the subject of almost universal remonstrance and complaint. In our remarks on this important measure, we have wished to pursue the line we have laid down for ourselves, as the steady friends of the principles on which it proceeds, but as wishing to see these rightly developed.

ART. III. — MONRO'S ACTA CANCELLARIÆ.

Or Selections from the Records of the Court of Chancery, remaining in the Office of Reports and Entries. In Two Parts. Part First containing Extracts from the Masters' Reports and Certificates, during the Reigns of Queen Elizabeth and King James the First. Part Second containing Extracts from the Registrars' Books, from A. D. 1545 to the End of the Reign of Queen Elizabeth. By CECIL MONRO, One of the Registrars of the Court. 8vo. Benning.

THE revelations of Mr. Monro indicate a mind commendably devoted to the business of his Court and the duties of his office. As a diligent and experienced Registrar, he has had many favourable opportunities of exploring the abstruse antiquities of the Court of Chancery, and has not been repelled from the inquiry by the labour which it involves. The preface gives us to understand that his materials have been extracted from documents, covered with the dust of nearly three centuries, which repose in the "Report Office." Mr. Monro became anxious to know the contents of these venerable collections, and imposed upon himself the task of examining them. The result has been the present work; of which we must observe, that while it contains much valuable, instructive, and curious matter, the amiable and pains-taking editor, animated by an over-love of his subject, has, here and there, inserted some few articles, either trivial or of questionable significance, which might well have been omitted, and which, in fact, should have been suffered to continue undisturbed and unnoticed in those appropriate resting places where they have so long enjoyed oblivion.

There are, however, things in this volume which not only throw light on many points of the modern practice of the Court of Chancery, but which may serve most effectually to assist the legislature in the improvement of our legal institutions, by showing that the work of amendment will be in a great degree the work of restoration.

Not a few of the blemishes which exist in our judicial machinery, as well as in the frame of our government, have been the result of an unhappy and ill-considered deviation from the ancient standard. To this cause, for example, may be referred the circumstance, that we have now two co-ordinate and independent appellate jurisdictions in the last resort; an anomaly not only unknown and unheard of in any other country, but unthought of in *this*, till the time, when, under the Tudor reigns, the Privy Council, formerly annexed and ancillary to the House of Lords, became a separate tribunal.

But of all the precipitate and unfortunate changes ever introduced into our judicial establishment, there was none so fatal in its consequences as the separation of the temporal and ecclesiastical tribunals. It was not until after the Conquest that the maxim, *sacerdotes a regibus honorandi sunt, non judicandi*, was established in this country. And this was the doing of William the Norman, who was supported by the clergy, whom he liberally endowed. He it was who prohibited any spiritual cause being tried in the secular courts, and commanded the suitors to appear before the Bishops, whose decisions were governed, not by the *lex terræ*, but by what is called the *jus canonicum*; invented, we are told, by sour ecclesiastics, at a time when the ignorant laity were plunged in the lowest superstition.

Nearer our own day, another disjunction took place. The Court of Chancery, from causes which we shall not now stop to examine, had gradually assumed a two-fold aspect. It was, in the Plantagenet reigns, a court both lay and spiritual. This is indisputable. When the practice of appointing Bishops to be Chancellors ceased, we immediately find indications of a contest of jurisdiction between the two tribunals; for the partitions which formerly divided the Chancery and Ecclesiastical Courts were infinitely thinner than at present. And see the consequences of the gradual alienation which has ensued. The discerning and thinking public are now unanimously agreed (whatever may be said to the contrary in Doctors Commons) that these Courts ought forthwith to be amalgamated; and this, accordingly, has been the scheme of

all the ministers that have been in office during the last fifteen years, whether Tory, Conservative, or Liberal.

It is with a view to this object, that we consider the labours and disclosures of Mr. Monro to be at the present crisis peculiarly seasonable, because there is no argument more potent in favour of a great change than that which, besides demonstrating its utility, shows also that the thing proposed is not an untried novelty, but is, in fact, a revival of an ancient institution. This argument, backed by other manifest advantages, gave popularity to the County Courts' scheme, — a scheme which, had it not been sanctioned by the practice of our Saxon forefathers, would have been opposed with all that determined pertinacity which the sober good sense of the people of England discovers when resisting mere innovations.

Let us take a few specimens — and we have space but for a few — in illustration of what we mean. To begin with causes for the recovery of tithes. These had been for a long period decided in the Courts of Chancery and Exchequer. The jurisdiction of the latter Court in such cases ceased with the Act 5 Vict. c. 5.; and that of the former, which still exists, has been but rarely resorted to since the Tithe Commutation Act, 1 & 2 W. 4. c. 100. Both these jurisdictions are referred to as having cognizance of tithes in the work before us; *Mone v. Bane* (A. D. 1593, Act. Canc. 642.); while any jurisdiction of the Queen's Bench in such matters is expressly denied. (Ibid. 643.) It would appear, however, that the Courts of Equity took cognizance of tithes specially, where the lands out of which they were demanded were holden of the Crown in chief; and two reasons are assigned for this; 1st. that it was "*for the benefit of the Queen's Majesty* that it should be so; the Court of Chancery having the dispensation of her Majesty's own pre-eminent equity and absolute judgment, from which no subject is or can be excused;" and, 2ndly, because "the assistants of the Court are civilians," and "*therefore competent judges of tithes*" (A. D. 1593), clearly indicating that tithes were originally of Ecclesiastical cognizance.¹ The right and title to tithes generally, however,

¹ See the case of *Hill v. Osborne* (A. D. 1599, Act. Canc. 726.), where a

was occasionally committed to the hearing of the Court of Chancery; and we would direct attention to a decree of Lord Keeper Sir Nicholas Bacon, pronounced 28th April, 1566 (*Pygot v. Onslowe*, Act. Canc. 358.), showing the practice of the Court and the form of a decree made on such an occasion. Thus:—

“In the matters in variance between Richard Pygot and Fulke Onslowe, committed to my hearing by both their assents, it is ordered this 28th of April, 1566, upon the hearing of the matters by the assent of both parties, that the whole right and title of the tithes in question shall be committed to the order and judgment of Doctor Huycke and Doctor Yale, civilians; and further, it is agreed that, if, by their judgments, upon the sight of depositions and examinations taken either in the Star Chamber or in the King's (Queen's) Bench, it shall appear that the tithes ought to be paid, then the said Onslowe shall quietly have and possess the same, during the time of his lease, together with the arrearages, without let or denial of the said Pygot, or of any other claiming by or from him; and, on the other part, if it shall be adjudged by the Doctors that the tithes be not due, that then the said Pygot shall hold his lands discharged of tithe, without trouble of the said Onslowe, or of any other for him; and if the said Doctors shall not show their opinion and judgment therein before the 12th day of May next, that then it shall be lawful for the said Onslowe to prosecute his causes according to the order of the law, as he might have done if this order had not been made; and it is further agreed, that, if judgment shall be given of the right of tithes, in form aforesaid, that then either party shall be discharged of any costs to be demanded of other.” (*Pygot v. Onslowe*, Reg. Lib. B. 1565, fol. 104.)

If this form of decree be compared with one of the present day, these differences will be discernible. In the ancient decree, the Master (both the civilians named were Masters) is constituted Judge of the matter in dispute, whereas in a modern decree for tithes, the Master is only directed to take an account. Again, in the ancient decree a time is fixed within which the Master is to make his report, subject to the penalty of the plaintiff losing the benefit of his order (a rule

tithe case arising in the diocese of Norwich is referred to the end and determination of the Bishop, whose decision, however, is not to bind without the decree of the Court of Chancery.

of practice which perhaps tended to expedite proceedings), and the Court is more minute in following out the prospective consequences than would be the case now. Accordingly in the ancient decree, further directions and costs are not reserved, nor is it, indeed, usual to reserve them in tithe suits even at the present day, although examples to the contrary do occasionally occur.¹

It was under the auspices of the great Lord Ellesmere² that the jurisdiction of the Court of Chancery with reference to legacies was established. We say *established*, because the jurisdiction undoubtedly did exist at a much earlier period. For we doubt whether any one can point out the time when suits for the payment of legacies were deemed exclusively of ecclesiastical cognizance; but if it appeared that maintenance in respect of legacies, or security for payment was required, recourse *must* be had to the Court of Chancery (A. D. 1608).³

Thus by degrees the Chancery came to exercise, first, a concurrent, and ultimately, we may fairly say, an exclusive practical jurisdiction with regard to legacies. Accordingly, demurrers to bills for payment of legacies, on the ground "*that the same being a legatory matter, and the plaintiffs should seek their remedy by order of the Ecclesiastical Laws, and not in this Court*" (A.D. 1575), *Cliffe v. Cliffe* (Act. Canc. 425.); or "*that a recovery of a legacy in this Court could not be pleaded in bar of any Ecclesiastical Court whatsoever*" (A. D. 1607), *Wickham v. Dighton* (Act. Canc. 109.), were gradually overruled.

Another proof of what may be called the cognate character of proceedings in the Chancery and Spiritual Courts is derivable from the fact, that the validity of wills and testaments was formerly determinable in Chancery; and there are cases showing that the practice often was to refer such

¹ See "Seton on Decrees," p. 205.

² This eminent man held the Great Seal for upwards of twenty years. He is one of the great names of Lincoln's Inn, yet has he no effigy in the hall of that society, where, however, we see wooden representatives of two *Protestant* bishops, with mitre and crozier. The only *Chancellor* thus honoured is Lord Hardwicke, who was an alumnus of another Inn!

³ See S. C. Act. Canc. 94.

matters to the Masters (A. D. 1573), *Lucas v. Burgis* (Act. Canc. 398.), and mayor, &c., of *Faversham v. Parke* (Act. Canc. 410. A. D. 1574), reserving further directions. The reasons appear to have been because the Masters were supposed to be of good judgment in the *Civil Law* (A. D. 1591), *Cicill v. Countess of Rutland* (Act. Canc. 618.). But this practice was not always followed, for in *Browne v. Richards* (A. D. 1600, Act. Canc. 761.), *the validity of the will and administration mentioned in the plaintiff's bill* seeming more meet to be decided in the Ecclesiastical Court than in this Court, it was referred to be there tried accordingly. And in *Handall v. Lyttle-John* (A. D. 1602, Act. Canc. 769.), a trial at law appears to have been directed touching the validity of a will, and the Court of Chancery fixes a time "*for the hearing of the matters in equity reserved.*"¹

Another and most important and interesting head of jurisdiction, which the Court of Chancery appears formerly to have exercised, related to marriage and divorce — matters now, and for two centuries past, exclusively of ecclesiastical cognizance.

With respect to marriage, there are many instances to be met with in which the Court of Chancery acted as a Court of Reconcilement, taking on itself "to mediate a charitable and loving end between the parties." (*Castillian v. Castillian*, A. D. 1612, Act. Canc. 166.) In *Cornewall v. Abrahall* (Act. Canc. 51.), the bill and answer in a suit relating to a matrimonial dispute having been referred to Dr. Carew for his opinion as to what he thought meet to be done in the cause, he reported, after stating the substance of the pleadings,

"That it will be fitting that the suit be stayed, and that a commission do issue to two individuals resident on the spot to call all parties before them, and to take such order therein that the married couple may be brought to live orderly, and the plaintiff (the husband's father) to make an allowance of so much, as, by the agreement, he ought to do; but not to deliver the same to maintain them in their dissolute course of life, but rather to drive them to repentance and

¹ In *Leake v. Marrowe* (A. D. 1576, Act. Canc. 440.), we have an instance of a case on a will sent to the Judges, and a decision of the Court of Chancery on their certificate.

reconciliation in amendment of life, by withdrawing maintenance from them; and so take order that they may either be reconciled, and live as they ought to do, and becometh man and wife, or else see them so placed with such maintenance as the honesty of their lives shall deserve."

This method of starving married couples into good behaviour Lord Ellesmere frequently adopted; but with what success does not always appear. In *Castillian v. Castillian* the same Master (Dr. Carew) says, "Forasmuch as I found the cause to stand upon a variance betwixt the husband and the wife, the first care I took was to repair the breach between them." He then states the circumstances of the case, and, after detailing his vain endeavours to persuade them to cohabit, finds himself compelled to admit his want of success — "chiefly from the obstinacy of the wife." The Lord Chancellor thereupon directs him to take the matter again in hand, which he did, but without effect.

But these attempts at reconciliation by the gentle pressure — the *douce violence* — of the Court of Chancery were not always unavailing. In *Symons v. Burton* (Act. Canc. 266.) we find two Masters (Sir James Hussey and Sir John Haywarde) reporting to Lord Chancellor Bacon (A. D. 1618) as to an arrangement between a husband and wife, in the following terms: "We thought fit that the said Martha should repair unto her said husband's house, where he dwelleth, upon Saturday, being the 20th of this instant February, in the forenoon of the same day; wherefrom thenceforth continually they shall endeavour lovingly and peaceably to live and dwell together," &c. &c.

In *Staples v. Staples* (Act. Canc. 173.), Lord Ellesmere (A. D. 1612) referred a case of this sort to the Archbishop of Canterbury.

Thus much as to the reconciliation of married parties through the intervention of the Court of Chancery and its officers.

With respect to divorce, we do not find in Mr. Monro's publication any evidence of the exercise of jurisdiction in Chancery. It is plain, however, that the Court, formerly, did pronounce decrees, such as are now only to be had in

the Ecclesiastical Courts. This appears by Tothill's Reports, where two cases, in the time of Hen. VIII., are mentioned, in both of which Lord Chancellor Audley pronounced sentences of divorce, *à mensâ et thoro*.¹

Here, therefore, we see that in former times the Court of Chancery and the Court Spiritual went hand in hand in the administration of justice. For, with regard to tithes, legacies, wills, administrations, marriage, and divorce, the jurisdiction plainly appears to have been concurrent. Now, without discussing the causes which have occasioned the disrepute and unpopularity of the Ecclesiastical tribunals, we content ourselves with observing that Courts which came so near each other by their original constitution, ought no longer to be kept asunder. A junction would prove of benefit to both. It may be said that this would, in fact, involve the extinction of the minor establishment. It would, undoubtedly, merge in its greater and more prosperous rival. But this need not injure individuals. This would only be doing what was done in Scotland twenty years ago, namely, vesting the ecclesiastical jurisdiction in the supreme temporal tribunal of the country.

Those who will look carefully into the work of Mr. Monro will find other evidences of the facts which we have stated; all of them yielding additional confirmation of the argument which we have advanced.

To show that from this work light may be thrown on several points of modern practice, we will shortly direct attention to the remarks of Mr. Monro on the privilege of suitors to sue, when necessary, *in formâ pauperis*; a privilege which, in other countries, stands on a foundation of justice and humanity, but which in England was introduced by statute.

Thus, by the 11 Hen. 7. c. 12. poor persons are admitted to sue at law *in formâ pauperis*; and, by 23 Hen. 8. c. 15., are excused from paying costs, but shall suffer *other punishment at the discretion of the Judges*. These words are borrowed from the Canon Law, "*si solvendo non fuerit, alias*

¹ See Tothill's Reports, p. 61. ed. 1649, p. 124. ed. 1671.

secundum arbitrium judicis discreti puniatur."¹ It is somewhat singular that the words "other punishment" have generally been held to mean whipping, or at least *corporal punishment*.² The words of the statute of Hen. VII. seem to apply only to suits at common law; but they have been long construed as extending to suits in Equity. We believe the earliest instance found in the Registrar's Book of an order for leave to sue *in formâ pauperis* was in L. K. Sir N. Bacon's time (A.D. 1571), in the cause of *Jefferis v. Curwin* (Reg. Lib. B. 1570, fol. 240.). The order in *Pink v. Rumbold* (Act. Canc. 493., A.D. 1580), prescribes an oath of poverty to be taken, the form of which, viz., "*that he is not worth the sum of five pounds, his debts being paid,*" is given (A.D. 1584) in *Wollan v. Minse* (Act. Canc. 535.).³ In the same year, in *Odlye v. Johnson* (Reg. Lib. B. 1583, fol. 458.), in addition to the affidavit, it is stated that "xii of the best inhabitants of Bosworthe, where the plaintiffe dwelleth, have certified his poverty." A similar certificate was often required. Sometimes the order was made on a simple allegation of poverty, as in *Stopforthe v. Hanmer*, 24th June, 1585 (Reg. Lib. A. 1584, fol. 633.), and many others which might be cited. Sometimes the oath omitted the clause as to *the debts being paid* (*Payton v. Rychards*, 22 Nov. 1585, Reg. Lib. A. 1585, fol. 192.). We have at this moment before us references to twelve cases in the Registrars' Books, in the years 1585, 1586, 1587, and 1588, in which these words are wanting. In 1591, in addition to the plaintiff's oath, "that he is not worth five pounds," we meet, for the first time, with the words, "*besides the things in question;*" *Raynolds v. Medowes*, 21st April, 1591 (Reg. Lib. A. 1590, fol. 470.). In one case, *Warde v. Wade*, 23d Nov. 1593 (Reg. Lib. A. 1592, 3. fol. 619.), the plaintiff, besides the common form of affidavit, swears also to the Queen's supremacy. Soon after L. K. Egerton received the seals, we find (A.D. 1597) these words tacked to the order:—" *With this provision, neverthe-*

¹ See Law Review, No. I. p. 74.

² Ibid. p. 77.

³ This oath, which is not prescribed by the act of Hen. VII., was adopted from the practice of the courts of Common Law.

less, that if the matter shall fall out against him, then he is to be punished by pillory and whipping;" *Turvylye v. Turvylye* (Act. Canc. 709.). This is the construction put on the words "*other punishment*," of the statute of Hen. VIII. Whether "*whipping*" was ever actually inflicted it is hard to say. L. K. Egerton is said (Act. Canc. 131.) on one occasion to have ordered *a woman to be whipped*. In *Getdard v. Gardynere* (Act. Canc. 690.), a pauper plaintiff, having stood in the pillory, was excused from whipping; but L. K. Egerton (A.D. 1596) said, "*if he vex any more in this sort in formâ pauperis, then he shall, the next time, be whipped*." The same kind of orders were made certainly during the period of the Commonwealth, as the Registrars' Books show.¹ We will only add to what we have said on this head, that paupers are still obliged to swear that they are not worth five pounds; and we would suggest whether, regard being had to the great change in the value of money since the first framing of the oath, it might not be worth while to alter its terms, so as to make it embrace a much larger class of persons than can at present take advantage of the statute of Hen. VII.

The faults of this performance we will shortly advert to, so that Mr. Monro may avoid them in the further prosecution of his labours. He adheres too closely to a chronological order, and has devoted himself too much to what is curious; whereas, we think, he should make *utility* the chief and only aim of his subsequent inquiries. He imagines, but we do not agree with him, that a book on the practice of the Court of Chancery may be made amusing as well as instructive. Hence, his notes are occasionally rather literary than legal. It was Sir Edward Sugden, we believe, who regretted that the genius of Bacon (which had shone with so much brilliancy on *Uses*) should have been diverted into the vain pursuits of philosophy. Mr. Monro, therefore, will not be offended when we advise him to be more sparing hereafter of such stories as he has given of the "three daughters of Hooker," who, it seems, were suitors in Chancery, and of whom Mr. Monro remarks, that "it is melancholy to think that such

¹ And see Sand. Ord. Canc. 218. 262.

should be the fate (they were left destitute) of the children of a man of whose works a Pope (Clement VIII.) could say that there is in them "such seeds of eternity that they shall endure till the last fire shall consume all learning." Now, barring the circumstance of the pontifical commendation (to which Mr. Monro attaches more importance than we do), we are not aware that there is any thing at all remarkable in the fate of these respectable spinsters. On the contrary, their case is the most common of all occurrences. Mr. Monro has furnished us with a *fac simile* of "the historian Haywarde," which, he assures us, is more authentic than any previously published. But, unfortunately for us, we had never heard of this "historian" till we fell in with Mr. Monro's volume; and we venture to say that the bulk of his readers will be in a similar state of ignorance. But, were this otherwise, what has it to do with the *Acta Cancellariæ*? Again, Mr. Monro has indulged in an inquiry as to the correct spelling of the name of Sir Walter Rawleigh. This is clearly out of place, and utterly unsatisfactory; because the heroes of the Elizabethan age (Shakspeare included) adhered to no rule in the spelling of their names. But Mr. Monro will say these are *antiquities*. To this we answer that the study of antiquities, like the study of nature itself, may be overdone. The criticism of D'Alembert on *Clarissa* was that of a man of sense, as well as a mathematician: "Il est bon d'imiter la nature, mais non pas jusqu'à l'ennui." Human life, since the Deluge, is too short for inquiries into the items of a tailor's bill in the fourteenth century; although, we believe, it was only very lately proposed to issue a Royal Commission in order to tell the world "what it cost in the Plantagenet reigns to clear the rust from a king's sword, and how much he paid for his boots." Mr. Monro, however, sins but little in this way. Still we would counsel him to remember constantly that he is a Registrar, and that his work does not belong to the department of the belles-lettres. His official experience admirably qualifies him to compare the merits of the ancient and modern practice of the Court of Chancery; but in the regions of light and frivolous literature, a Registrar may be surpassed by other men. Mr. Monro should

think of Bacon, and take care not to forfeit the commendation of future writers on Vendors and Purchasers by deviating from his proper *métier*. Does Mr. Monro imagine that any Chancery practitioner is curious to hear about "a certain William Shakespeare, *not* the Poet, but a connexion or contemporary, an indifferent character from his youth up, and who *may* have been the real actor in some of the excesses now popularly attributed to his great namesake?" or does Mr. Monro think that the profession cares a rush for "George Ruggell, who was *perhaps* the author of the 'Comedy of Ignoramus?'" It is not by such investigations that Mr. Monro can hope to throw light on the obscurities of Daniell or Headlam. He will by and by come to the time of Lord Keeper Coventry, who held the Great Seal for fourteen years, and who we are told by Lord Hardwicke¹ "was very able, and contributed a great deal towards modelling the Court of Chancery." It will then and afterwards be Mr. Monro's business to make his extracts with a constant view to the existing constitution and actual working of the Court in the present day. To do this as it should be done, Mr. Monro (we are sorry to pronounce such a sentence) "must renounce the poets." Mr. Monro will do better service if he carefully extracts all those decrees which tend to throw light on the former powers of the Master as compared with those he now enjoys, on which he has already given some information. A present Master has been rightly compared to a man dancing on a board, who, if he steps an inch off it, gets a rap over the knuckles.

¹ See "Letter of Lord Hardwicke" in the "Life of Lord Kames," vol. i. p. 246.

ART. IV. — LEGAL EDUCATION IN FRANCE.

HAVING recently deemed it our duty to bring before our readers the very imperfect state of our institutions for legal education in England, and having in our last Number pointed out various strong and weighty considerations for endeavouring to improve these institutions, and given part of the evidence taken last session before the Select Committee of the House of Commons on the subject, we now think there may be some use in inquiring what neighbouring nations have done in this department. We shall not begin with Germany, whose splendid universities and libraries, and whose professors and writers, equally distinguished for their original talents and high cultivation of them, as for their persevering energy and zeal in laborious investigation, have contributed so largely, during the last sixty years, to the advancement of legal science. We shall, for several reasons, which will appear manifest in the sequel, commence with our more immediate neighbours on the other side of the Channel; and we shall not shrink or abstain from the inquiry because the comparison may perhaps prove unfavourable to England. The British nation has long had so many solid grounds of self-congratulation in the superior advantages enjoyed under its free institutions, whether the government be denominated a limited monarchy, or an aristocratic republic, that no Englishman need feel any grudge or degradation in admitting, that in some departments our neighbours surpass or precede us, or in availing ourselves of their experience, or in adopting a suggestion from their institutions, and, ultimately, perhaps improving upon the model.

In France and the other continental countries, as well as in Britain, the teaching of law appears to have had its origin in the universities and colleges established during the middle ages, under the influence of the clergy, who were, in those ages, the most educated class of the community or nation,

These universities and colleges appear to have been founded under the authority of papal bulls, royal charters, charters

from large cities, princes, and other inferior dignitaries; the endowments generally proceeding from the Crown or Government, the Municipal Corporation, or wealthy individuals. It might be interesting to trace the history of the early schools of law in France, in their ancient universities and colleges, not only in Paris, but also in the large cities and capital towns of the provinces. And valuable information on this head is to be found in the elaborate, and, at the same time profound, work of Savigny on the European Universities, in his *History of Law in the Middle Ages*¹; and, so far as regards France, in the abridgment from that work, made by the able editor or director of that respectable journal, the "*Revue de Législation*," vol. ix., pp. 241. 401.

But this is not the place for such erudite investigations. Our present object is chiefly practical. And we shall confine our inquiry to the provision made in France for legal education during the present century. We may only here observe, that the number of these ancient *Universités des Lois*, containing *Facultés de Droit*, was considerable — about fifteen; that the most celebrated were those of Orleans, of Bourges, and of Toulouse; and the most ancient, that of Montpellier. And we may add, that what was formerly considered a defect in France, as a realm or domain, and is said to have been only remedied by the Revolution, and the enactment of the several codes, appears to have increased the number of those separate schools of law. For, although in

* possession of a central and compact territory, France was certainly in former ages divided into various provinces, which long remained to a great extent independent of the Crown or supreme power, and were governed by different laws and usages.

In these nearly independent provinces there had early arisen a comparatively Supreme Judicial Establishment: according to the ordinary division of labour, in the progress of civil society, a certain portion of the population in these separate communities had devoted themselves to the study and practice of the law; and this class of practitioners came,

¹ *Geschichte*, vol. iii. Kap. 21.

in the course of time, to form associations, and to be incorporated, and to establish regulations for themselves, and for the instruction of their assistants, who were in time to be their successors.

Having thus alluded to the fact, and to one of the less apparent causes, of there having existed in France numerous ancient *Facultés des Lois*, not merely in the capital, but also in the large provincial towns throughout the kingdom, we proceed to notice, briefly, the chief enactments relative to legal education made during the present century. We are naturally anxious to derive our information from authentic sources, such as state documents, or the writings of authors of the first order. And, on this occasion, we do not think we need look farther, or can do better, than take the very able and lucid report made by M. de Salvandy, Minister of Public Instruction, to the Commission des Hautes Etudes du Droit, in 1838.

On the statements, in point of fact, in this official report we may completely rely. And it contains, besides, a very able discussion of almost all the questions which are likely to occur, and of all the points which remain to be decided, in any attempt to form, or re-construct, and improve, schools of law, so as to render them efficient. We shall not give a complete translation of the report; for it is long, and contains a good many matters peculiar to France, which cannot be so interesting or useful to foreign nations. But we here propose to extract its substance, as calculated to afford useful information to the members of the Inns of Court, in the discharge of their constitutional functions and duties; and also to the members of any legislative committee who may be re-appointed, or of any royal commission which may be issued on the subject.

After a sufficiently ample time allowed for deliberation, this subject was last year brought under the consideration of the Legislature, by M. de Salvandy presenting to the Chamber of Peers the draft of a bill on the teaching of the law, and the organisation of the Faculties.¹ And of the subsequent

¹ See note at the end of this article.

proceedings we hope to be able to give some account, if not in the present, at least, in our next Number ; as also of the views entertained with regard to those suggestions, which may not have yet been adopted by such distinguished lawyers as Messrs. Troplong, Giraud, Laboulaye, and Wolowski.

1. *Organisation or Constitution of the Facultés de Droit, or Schools of Law in France.*

To begin with the commencement of the present century, the schools of law, which were comprised within the precincts and plan of the ancient universities, were recognised by the General Law of the (14 Floreal, An. X.) 1st March, 1802, on Public Instruction, as making part, under the title of Special Schools, of the complete system of instruction which that law destined for the different classes of French society. The twenty-fifth article authorised the government to carry the number of these schools to ten ; each being to have four professors at most. The law subjected them, with all the other special schools, in order to insure order and discipline, to the high superintendence of their general inspectors of studies.

By a principle which consecrated all the rights of public power, the law reserved to the government, in an express manner, the faculty of introducing into the special schools all the improvements of which it should judge the organisation and constitution, or the plan of teaching, to be susceptible. This was a mode of giving strength to government, in order to insure all such ameliorations, that is to say, the interests of all, against the resistance of routine and of private interest.

A special law, passed a short time after, that of the 13th March, 1804, determines the subjects to be taught ; viz., the civil French law, in the order established by the Code Civil ; the elements of natural law, &c. ; the law of nations ; the Roman law, in its relations to, and connections with, the French law ; the civil law, in its connections with the public administration ; criminal law ; and the civil and criminal procedure. It fixes, at sixteen years, the age of admission into the schools ; and prescribes three years, as the duration of the

course of studies for the licence, with a year more for the doctorship. It establishes an examination at the end of each of the first two years; two examinations and a public act, or performance, at the end of the third and of the fourth year for the licence and the doctorship; it institutes, besides, a course of special studies on criminal law and procedure, of which the duration is a year, and which is terminated by an examination, in consequence of which the individuals judged capable receive a certificate of capacity. In entrusting the examinations to the professors, it confers on the inspectors of the schools of law the right of assisting at them, and of interrogating the students; at the same time, it preserves their title to the ancient doctors and licentiates in law in the French universities, under the burden of exhibiting their letter or diploma, or of obtaining an act of notoriety, as well as to the doctors and licentiates admitted into foreign universities, upon the condition of six months' practice in the quality of advocates, or law practitioners, &c.; in a word, it establishes the necessary securities for the maintenance of vested rights. It determines, at the same time, the professions and employments for which the studies of law are to be required; for example, the professions of advocate or barrister, attorney, solicitor, or law agent (*avoué*) notary, &c. It increases to five the number of inspectors-general of the schools of law, and confers on them the duty of inspecting, each two schools, and of making presentations to the chairs becoming vacant or to be instituted.

The decree of the 21st September, 1804, confirms and unfolds the provisions of the law of the 13th March. It arranges that the inspectors-general shall compose a general council for the teaching and the study of law; it determines the number of the professors for each of the schools, their obligations and their prerogatives; the council chooses a dean, by election from among its members, who presides at its deliberations, and at the public acts of the school. It fixes the number of enrolments (*inscriptions*) necessary for obtaining each degree in the schools; four for the certificate of capacity, in criminal law and procedure, eight for the bachelorship, twelve for the licence, sixteen for the doctor-

ship. It regulates the expenses of the studies of the examinations and public acts, and their application; in fine, it determines the dress (*costume*) which the professors and doctors of law ought to wear in delivering their lectures, at the examination and public performances, and the manner in which the lectures are to be delivered. This decree fixed at twelve the number of schools, and assigned the cities where they were to be established. But, as Turin, Brussels, and Coblentz, have ceased to belong to France, the number of these establishments has been reduced to nine, — Paris, Toulouse, Strasbourg, Rennes, Poitiers, Grenoble, Dijon, Caen, and Aix.

These two acts, or statutes, have served as the basis of the organisation, and of the plan of teaching of the schools of law in France for upwards of forty years. An *Instruction*, dated the 19th March, 1807, contains detailed regulations for their execution. These regulations are still in vigour.

The Organic Decree of the 17th March, 1808, which constituted the University (Imperial) conformably to the law of the 10th May, 1806, maintained the existing organisation, erecting the schools into Faculties. In that *régime* they formed the second of the five orders of Faculties which were created. They were to reckon upon special representatives in the council, which was placed at the head of the constitution of the university, in order to assist with its learning and knowledge the Grand Master, charged in terms of the decree with governing and regulating every thing. The general inspectors of law, conformably to these principles, by a decree of the 5th June, 1809, became inspectors-general of the university, representing the order of the Faculties of Law.

Since that time, several ordonnances and diverse statutes have intervened, partly upon the administration, partly upon the discipline, rather than upon the constitution of the Faculties. The ordonnance of the 5th of July, 1809, called for by the disturbances, of which the return was then frequent in the schools, imposed on the young people new conditions of admission to the courses: it required certificates of assiduity; it established a mode of procedure, and pronounced penalties

of discipline against those whose conduct might be seriously reprehensible. In the view of putting an end to the abuse which was introduced, of postponing all the examinations to the end of the courses of study, the ordonnance of the 4th of October of the same year fixed the periods at which the two first examinations behoved to be undergone, viz., the first after the fourth quarter, and the second after the eighth quarter.

The plan of teaching has also received considerable modifications, in virtue of the faculty reserved to government, by the law of the 1st of March, 1802, of introducing into the special schools all the ameliorations which it might judge necessary or useful. The royal authority has enlarged, on repeated occasions, the circle of teaching in the greater part of the Faculties of Law; and the government, before and since 1830, has constantly exercised the right which was reserved to it by the text of the law of the 13th of March, 1804, of nominating, for the first time, directly, and without any competition (*concours*), the professors of the new chairs. This right, besides, has never been questioned.

The ordonnance of 1819 upon the school of law of Paris, beside dividing the school into two sections, and doubling the greater part of the courses, instituted new chairs,— 1. Of the Law of Nations, and of General Public Law; 2. Of the Code of Commerce; 3. Of Public Positive Law, and of French Administrative Law; 4. Of the History of Law, and of Political Economy. The ordonnance of 1822 suppressed these four chairs. The three first were re-established in 1828 and 1829; that of Political Economy was so in 1830.

In 1834, M. Guizot established the chair of French Constitutional Law. More recently the present minister (1838), in order to raise the study of criminal law, instituted a chair of Comparative Penal Legislation. The provinces have not been neglected. The plan of teaching, at first very limited, has been completed successively: three Faculties only possessed the teaching of administrative law; the present minister (1838) has obtained from the Chambers the necessary funds for extending it to them all. Now there are five chairs, with the same titles, in each of the schools of

Aix, Caen, Dijon, Grenoble, Poitiers, Rennes; those of Strasbourg and Toulouse have six; Strasbourg has a course of the law of nations; Toulouse of French public law, the last only nominal, as it has not yet been filled up. Paris reckons seventeen chairs, but which, on account of the duplication of the courses of Roman law, and of the Code Civil, must be reduced to ten distinct chairs; viz., as in all the schools, courses of the Roman law, of the Code Civil, of civil and criminal procedure and criminal legislation, of the Code de Commerce, of administrative law,¹—in addition, a course of the law of nations, as at Strasbourg, and courses of the Pandects, of the history of the Roman law, and of French law, of French constitutional law, and of comparative criminal legislation, which Paris alone possesses.

The first year comprehends the teaching of the two first books of the Code Civil to succession, and of the Institutes of Justinian. The second year comprehends a second part of the Code Civil, the Code of Civil Procedure, the Code of Criminal Prosecution, the Penal Codes, and a book of the Pandects. The third year comprehends the remainder of the Code Civil, the more important matters of Administrative law, and all the Code de Commerce. The fourth year comprehends the history of French law, of the law of nations, and the constitutional law. The students who aspire to the doctorship have a right to attend all the other courses of the school.

There are obligatory for the first examination, which takes place after the fourth enrolment (*inscription*), the two first books of the Code Civil, and the two first of the Institutes of Justinian: For the second examination, after the eighth enrolment, the second part of the Code Civil, the Code of Civil Procedure, the Code of Criminal Prosecution, and the Penal Code: For the third examination, or first for the license, which may be undergone after the tenth enrolment (*inscription*), all the Institutes of Justinian, and the book of the Pandects, which the professor has explained: The last examination for a licence, the last part of the Code Civil, all the Code de Commerce, and the most important matters of administrative law, with some additions, which date from

1838. For the doctorship, two examinations are passed. The first turns upon the entire Code Civil, and the matters of the course of lectures relative to the history of law; the second, upon all the Roman law. The course of Comparative Penal Legislation is not classified, — the minister has not yet regulated what concerns it.

2. Numbers of Students.

If from the constitution of the teaching in the Faculties we turn our attention to their respective population, it is to be remarked that Paris exceeds in the number of students as well as of chairs; Toulouse, which reckons nearly 600 students, comes next; Rennes and Poitiers are of the same rank, reckoning from 230 to 250 pupils. The other schools have only from 130 to 160 students; that of Strasbourg, which has a course more than all the others, is the least numerous of the whole, in consequence of its frontier situation.

The total number of young people, who in the present state of society (while the notaryship does not require the studies of law, — while they are not obligatory for the administrative career,) demand such studies at our schools, amount to 5300; without counting the persons, attending the courses, who do not take enrolments, and who are usually distinguished by the appellation of benevolent or kindly auditors. The Faculties had not in 1830 more than 3500 students, so that the augmentation has been 1800. Is this increasing resort due to the mode of teaching? Ought we to see in it a sufficient testimony of the zeal and celebrity of the professors? Ought we not also to seek for the cause, in the general tendency of society to raise itself; in the increase of activity, which is felt in all the classes of the population; in the more lively impulse which the revolution of 1830, and the animated movement of our institutions, have impressed on all the serious studies, as on all the different kinds of ambition.

Now that the principle of the equal admissibility of all the citizens to public employments has become, in France, a reality, at the same time as a constitutional right, people are more occupied with the desire of putting themselves in a

condition such as to have the means of attaining all kinds of situations. On the other hand, election being the only source of all participation in municipal and departmental affairs, as well as in political affairs, a greater number of families feel the necessity of resting their importance on personal merit. Many, from different causes, have retired, or kept back from the military career, where the advancement is disputed by a greater number of competitors, and from the employments of court, which no longer exist; and have resorted to the studies of law, which occupy the first years of youth in a useful manner, — which allow a longer time for the choice of a profession or business, — and which, besides, are necessary for the proprietor as for the administrator of affairs, and for the magistrate. In a word, the knowledge of the laws is a condition, a station of influence, in a country of discussion and legality. The study of law is not only, as formerly, an obligatory preparative for certain professions; it has become a necessary completion of instruction for all persons, who aspire usefully to serve their country in the career of civil offices. We shall have to examine, whether, for many professions, the obligation ought not to be enacted by statute.

All these causes explain sufficiently the material, to use the expression, prosperity of the Faculties. But that cannot be sufficient for a government such as ours; its solicitude ought to increase with the increasing importance of these vast establishments. The demands of public opinion, those which are carried every year to the tribune of the Chambers, their own proper experience and information have made the administration themselves feel the necessity of investigating, with care and authority, whether there be not abuses to reform in the existing *régime*, whether there be not ameliorations to introduce into it. It is to march to the attainment of this object with a firm and sure step, that the commission of the higher studies has been instituted.

3. *Present State of the Schools of Law.*

The commission, here continues M. de Salvandy, ought first of all to observe, that, if the constitution of the schools of law has remained what it was at the commencement in

virtue of the law of the 13th March, 1804, and of the decree of the 21st Sept. of that year, there have taken place, out of the Faculties, changes which must have had upon their régime a detrimental influence. These events M. Salvandy here states at some length, but it is sufficient for our present purpose merely to mention them; the cessation of the science of law to be specially represented in the Royal Council of Public Instruction; the great neglect, under the Restoration, of the institution of the general inspectors of law; and the fall, under the Restoration, of the rectorial authority into such a state of weakness, that the Faculties no longer recognised its pre-eminence.

Thus, as must be admitted, continues M. de Salvandy, if some disorder was introduced into the schools, some relaxation in the discipline, some feebleness in the examinations; if good practices sometimes fell into desuetude; if it happened on some occasions, that some professors believed they had a dispensation from watching in a direct and paternal manner over the labours of their students, from exciting personally their emulation, from assuring themselves, by calls, of their assiduity, from animating their studies by not-written lessons, from making them improve themselves (*fructifier*) by interrogatories, from continuing the courses the number of hours per day, and the number of months per year, which the regulations had prescribed, we ought rather to wonder, that, by the sole power of their zeal for the fulfilment of their duties, the professors should have every where maintained the order, the rule, and the science, in the degree at which we may congratulate ourselves we see them at this day.

The irregular state of things, however, in so many respects in which we were, could not last longer. In the circumstances in which the country finds itself, when France, at the termination of her revolutions, settles herself at last, it is the duty of government to confirm, and to establish, and arrange all her institutions, in order to secure the days of repose and of progress which are promised us. In this general care, the studies, which exercise so much influence over the future destiny of nations, have a right to the vigilant attention of an enlightened power. The higher instruction

in particular has fixed the solicitude of the present minister; he is occupied in reconstituting the Faculties of Theology; he has re-organised the teaching of medicine; the teaching of the sciences, and that of general literature, are going to be completed, thanks to the liberal vote of the Chambers. The science of law could not be neglected. Thus, law is to resume its place in the council of the university. The Chambers have often expressed a desire for it; the minister at the commencement of his administration has engaged to effect it.

Already in expectation of the completion of the organisation which, at no distant period will restore to the royal council its general and uncontested authority, he has restored to it the authority in point of discipline which that eminent body holds under the constituent laws of the university; and it is found that its salutary jurisdiction has been first extended over the Faculties of Law. The rectorial authority has been everywhere confirmed; and will be able to provide for daily wants. The general inspection has been re-established. At this moment (1838) a president of the royal court of Toulouse presides, in virtue of an express delegation of the grand master, under the title of inspector-general, at the competition (*concours*) opened at Toulouse. The royal council which had at first combated the views of the minister on this subject has since sanctioned them by its adhesion.

The first idea of the minister had been to establish immediately the inspector-general authorised by statute; the objections of the council determined him to connect this arrangement (*disposition*) with a measure more important, and which will have more fruitful results,—the establishment of the commission of higher studies (*des hautes études*). This commission, the depository of all the interests of science, and representing them with as much authority as celebrity or pomp, will comprehend at first the general inspection in the number of its rights. It will then examine whether this is an attribute which ought to remain in its hands, or whether it may not be better to detach it from the commission in a regular and permanent manner, by the creation of special offices. But this will be only one of the points, which will receive its anxious attention. It belongs to the general

organisation. What the commission will especially investigate, after having ascertained the actual state of the Faculties under the government of the existing rules, is the ameliorations which may be introduced into them, under the twofold point of view of their organisation or constitution, and of their (extent and mode of) teaching.

M. de Salvandy proceeds to review the principal questions which ought to occupy the commission, under the twofold relation just mentioned. But this article is already of sufficient length. We shall therefore merely subjoin an enumeration of these questions. And we shall reserve our brief notice of the discussion of these questions by M. de Salvandy, so far as they are not exclusively and peculiarly applicable to France, for an article in a future Number, when we may perhaps be able also to exhibit the views on this subject of some of the distinguished French lawyers before alluded to.

Before concluding, we may remark, although it seems scarcely necessary, that, while we thus point out the energetic but prudent and judicious conduct of that department of the French government which is entrusted with the charge of legal education, and recommend a disposition to profit by the experience of other nations, and the views of foreign lawyers, we are quite aware, and decidedly recommend, that, in the application and adaptation of such suggestions to the perhaps peculiar legal institutions of England, and to the feelings, views, and habits, of Englishmen, the government and legislature ought to be very much guided by the high talent, profound knowledge, and practical good sense, to be found on the bench and at the bar. And, rejoicing in the appointment of the lectureships lately instituted by them, we hope the Inns of Court will persevere in resuming still farther the exercise of those powers and functions, with which they are in truth invested; and, for the exercise of which functions, indeed, these corporations appear to have been originally founded, and have their chief, if not only, legitimate existence.

Enumeration of the principal questions suggested by M. de Salvandy for the consideration and determination of the Commission: —

1. Is the present plan of teaching, defective in point of extent, from insufficiency in the number of chairs or professorships? Ought new chairs to be founded in the provinces or in the capital? 2. After determining what chairs or professorships ought to be filled up, ought the encyclopædical courses, usual in Germany and Italy, to be introduced? 3. Whether are the methods of teaching now generally adopted the best? How may they be improved? Whether, as at present, ought the professors to remain subjected to the text of the law, or whether would it be useful to introduce an order of teaching not so literal, and which could not be considered so much a matter of routine? 4. How, and to what extent, ought the Roman law to be taught? Is the course of the Pandects necessary, or is it sufficient? Ought the course of the institutes to be placed at the commencement, or at the end, of the studies? 5. What ought to be the form of teaching? Dictating, interrogation, or examination of the pupils, written lectures? 6. Whether should the mode or extent of teaching be uniform throughout the kingdom or not? 7. Ought the number of Faculties to be reduced or augmented? 8. Would it be expedient to distinguish the Faculties into two degrees or ranks, and to establish, in addition to Faculties of Law, some appellation, which they might bear, as has been done in medicine, such as secondary or preparatory schools? Or should the first degree of teaching be given to them all? 9. Can the police of the Faculties be improved? What ought to be the power of the dean? 10. What ought to be the mode of appointing the professors, whether direct nomination, or by election, after public examination of the candidates by the Faculties, in a competition of candidates or *concours*? Advantages and disadvantages of these modes? 11. What ought to be the rules of competition, or of the *concours*? Whether should the examination be by the whole professors of the Faculty? What the proofs of ability and knowledge? What the duration and extent of the examinations and trials? Whether should the assistant professors or suppliants be mere substitutes or associates and fellows? Perquisites or emoluments of professors for such examination of candidates? Whether a body of examiners going periodically through all the

Faculties of the kingdom? 12. Privileges of professors: dignity? boarders in family? 13. Preparatory schools for young people; examinations; vacations? Duration of whole course of studies required? 14. Whether enrolment (*inscription*) to be held sufficient to give title, or only actual teaching and study? 15. What should be the conditions for obtaining the licence to teach; the bachelorship; the doctorship? What are the professions for the exercise of which the study of law should be required? Whether certain degrees, or grades, for certain professions? 16. Whether schools and Faculties for the acquisition of the various branches of knowledge requisite in the administration of public or national affairs, internal or external? ¹

¹ In the Number of the "*Revue de Législation*" for March last, M. Edouard Laboulaye thus commences his "*Examen du Projet du Loi sur l'Enseignement du Droit*:"—"In presenting to the Chambers a bill upon the teaching of law, and the organisation of the Faculties, M. de Salvandy abides by a promise made now nearly ten years ago; and the fulfilment of which could not be longer delayed without inconvenience. It was in 1838 that the nomination of a commission, and the report of the minister called the public attention to a reform, which the government already considered as opportune. Some happy creations of professorships, through M. de Salvandy, and through M. Cousin, prepared men's minds for great improvements; the public opinion was excited in favour of a reform, which interested, in the highest degree, the future fate of a science altogether French; and if the ascension to power of M. Villemain disappointed the hopes which the memorable exposition of 1838 had excited, they have been revived with new vivacity on the return of M. de Salvandy; especially when the minister has been seen, faithful to his former views, to consult the Faculties, print their answers, re-assemble and preside over the commission on the studies of law; in a word, prepare completely, and under the eyes of the public, this grave question, which now only waits for a judgment.

"It is to M. de Salvandy that we owe the creation of chairs of administrative law at Dijon, Grenoble, Rennes, Strasbourg, and Toulouse; as well as the establishment at Paris of a chair of comparative criminal legislation: it was M. de Salvandy who induced M. Ortolan, and several other eminent professors, to undertake the charge of publicly teaching the law. In his passage to the management of state affairs, M. Cousin founded the chair of general introduction to the history of law, instituted annual prizes in all the Faculties, and endeavoured to open to the laureates the magistracy and the administration.

"M. Villemain obtained a vote from the Chambers for the establishment of the general inspection of the schools, proposed by M. de Salvandy. These measures, favourably received by public opinion, have exercised upon the teaching of law a happy influence, and given a new life to the Faculties in the departments."

So far for our neighbours: a word on our own progress in this respect. We had occasion in our last two numbers to complain of the slowness of the Inns of Court, and more especially of Lincoln's Inn, in completing the scheme which they had themselves projected. (4 L. R. 444.) Whether the conscience of this last honourable Inn has been touched by our reproaches or moved thereunto by any other cause, we cannot say, but it has, since our last number, taken a step in advance by issuing the following important resolutions: —

“Resolved, that students of this Inn having attained the age of twenty-three years, may be called to the Bar after the expiration of five years from admission, twelve terms having been kept, nine exercises performed, *and certificate produced of attendance on two courses of lectures.* Masters of Arts and Bachelors of Laws of the Universities of Oxford, Cambridge, or Dublin, *and students of the Inn not being graduates, but who on their application are examined in law and pass a sufficient EXAMINATION, having complied with the requisition in respect of terms, exercises, and certificates, may be called after the expiration of three years.*

“Resolved, that the present rule do come into operation on the last day of this term, and that the students admitted before that day have the option of being called to the Bar according to the regulation now in force. Resolved, that this order be communicated to the other Inns of Court.” Nov. 8. 1847.

These orders, but more especially that part of one of them which places the student who has passed a sufficient examination, on a level with those who have received a university education, have restored Lincoln's Inn to its pristine place in our affections. It is now Dux or Leader of the Inns of Court. And this is not all that it has done: it has in the same term elected Mr. Spence, Professor of Equity, an appointment which we hail not only as having secured the services of a most learned and experienced lawyer and scholar, but of one whose sympathies we know to be in unison with the advance and development of the science of the law.

Still, with every wish to praise, there is much, very much to be done by all these societies.

ART. V.—PRIVATE BUSINESS IN PARLIAMENT — CONSOLIDATION ACTS.

1. *Reports of Select Committees of the House of Commons on Private Business.* 1836—1847.
2. *First Report of the Select Committee on Private Bills.*
Ordered to be printed 14th Dec. 1847.

AMONG the most distinguishing characteristics of recent legislation has been the growing attention of both Houses of Parliament to what is called the Private Business. This, which in point of extent has been long the largest branch of the duties of the legislature¹, has at length come to attract a degree of attention in some sort commensurate with its importance, and a signal change has, in consequence, taken place within the last few years in the tone and character of both the houses of legislature, but which is especially remarkable in the House of Commons. It is not, as has commonly been supposed, that the amount of this branch of the labours of the legislature has increased as compared with the public business; on the contrary, it will appear, upon a slight inspection of the Statute Book, that the proportion of what are commonly called Private Acts², to the Public Acts

¹ The *Select Committee on Private Bills*, which sat in 1846, in their Report state, "that in the period which elapsed from the union with Ireland to the termination of the then last session of parliament, nearly 9200 local and personal bills passed into laws, and only 5300 public statutes."

² In common parlance it is usual to speak of acts of parliament as divided into two classes, *public* and *private*; the public being such as are of general application and which are brought into the House upon *motion*, the private being of a local or personal nature and brought into the House upon *petition*; technically, however, the private acts are divided into three classes:—

- 1st. Local and personal acts *declared public* and to be judicially noticed, such as acts for promoting town improvements, roads, canals, railways, harbours, lighting, waterworks, &c.
- 2d. Private acts, *printed* by the Queen's printer, and whereof printed copies may be given in evidence, such as estate and inclosure acts
- 3d. Private acts, *not printed*, such as name, naturalization, and divorce acts.

has rather decreased than increased of late years. If we take, for example, the last ten years of the reign of George the Third, and the first ten years after the passing of the Reform Bill, we shall find the proportions to be as follows:—

50 Geo. III. to 59 Geo. III.

Average number in each year of Private

Acts	-	-	-	-	244
Average of Public Acts	-	-	-	-	131

3 & 4 W. IV. to 5 & 6 Vict.

Average number of Private Acts	-	-	-	171
Average of Public Acts	-	-	-	100

In the character or objects of the acts, there has been a considerable change during this period. Formerly the great bulk of the private bills consisted of road bills and inclosure bills, and these bills were not of a nature to provoke much opposition from those who alone had the power of opposing them with effect, inasmuch as the interests of these parties were always carefully provided for. The management of the private business was at that time, for the most part, in the hands of a few influential members; and although we cannot but suppose that practices similar to those so much complained of at a later period, under the familiar name of *jobbing*, prevailed to a considerable extent, yet, as the managers contrived to conduct the business in a manner satisfactory to the select class before alluded to, it went on without attracting general attention—much grievous injustice being, no doubt, inflicted on the numerous small interests which were unable to make themselves heard; and the rights of the public being almost wholly neglected, except in so far as they were protected by the vigilance of the chairman of committees of the House of Lords.

When, however, bills to authorise the making of railways began to be brought forward (which at first were viewed

This distinction has not been at all times the same. Prior to the 38 Geo. 3. the first of the above classes, viz. the local and personal acts *declared public*, were treated as public acts, and printed in the volumes containing the public statutes, neither of the other two classes being at that time printed by the King's printer. From the 38 Geo. 3., the local and personal acts declared public have been printed distinct from the public statutes, neither of the other classes being printed until the 55 Geo. 3., when the present division took place.

with great jealousy and dislike by the landowners, and were consequently always opposed), and still further, as the number of these bills increased, and the competition of rival schemes added a new element of opposition, it soon became apparent, in the severe contests which took place between the parties promoting and opposing those bills, how utterly incompetent the House of Commons, with its then system of conducting the private business, was to deal with the questions which were daily brought before it. Then it was that those scenes of jobbing took place, and that utter recklessness of what belonged to the character of legislators or of gentlemen was displayed on the part of some members acting on committees on private bills, of which the evidence taken before the select committees appointed to inquire into the manner of conducting the private business, unhappily, leaves no manner of doubt, and which, if continued, must have ended in so lowering the character of the House of Commons as to deprive it of all respect on the part of the public.

It was fortunate that at this critical period a Speaker was selected to preside over the proceedings of the House of Commons whose great legal and constitutional learning, coupled with his laborious habits of business, and his firm yet cautious turn of mind, eminently fitted him to struggle with the growing evil, and, so far as in a Speaker lay, to apply a remedy. Mr. Abercromby seems, from the first, to have been fully alive to the great importance of the private business, and to have felt it to be the duty of the Speaker to watch over the proceedings of the House, with regard to this branch of its business not less vigilantly than with regard to the other and more prominent department. The practice which he observed from the first, of coming down to the House at twelve o'clock every day, where he was at all times accessible, not to members only, but to the Parliamentary agents,—taking pains in all cases in which questions upon the standing orders or other questions connected with the private business were likely to be made the subject of discussion in the House, to inform himself of the merits of the case,—had the effect, not only of enabling him to assist the judgment of the House in its decision on those points (an assistance which at that time, before

the constitution of the Select Committee on Standing Orders presently to be mentioned, was of inestimable value), but was attended with this useful result also, that, having thus become practically acquainted with the details of the private business, and with the working of the vast machine over which he was called to preside, he was the better prepared to suggest the means by which a remedy might be provided for the evils which were every day becoming more intolerable.

We do not propose to go in detail through the history of the several reforms which, dating from this period, have from time to time been made in the proceedings of the House with relation to the private business. The revision of the Standing Orders by a select committee appointed for that purpose (and since periodically continued); the establishment of a select committee on petitions, to whom were referred all petitions complaining of non-compliance with the standing orders, and whose proceedings were expected to be conducted with something of judicial strictness; the establishment of a Select Committee on Standing Orders, to whom are referred all questions of dispensing, under special circumstances, with the Standing Orders; the placing of the parliamentary agents on a recognised and responsible footing; the gradual reduction of the number of members serving on the select committees on bills, and the establishment of regulations under which they were required to pledge themselves to abstain from voting upon questions as to which they had not heard the evidence: these (of which some account has been already given in this work) were, shortly, the improvements which the House, acting upon the recommendation of committees from time to time appointed to inquire into the means of improving the private business, adopted and embodied into its Standing Orders, and which, if they have not had the effect of rendering the machinery of the House of Commons perfect for the objects aimed at, have, at least, removed all the more crying objections. Canvassing is no longer practised among members of committees, and jobbing ceases to be heard of. The judgments of the committees are at least admitted to be given according to their means of knowledge, and the honour of the House is saved.

The practice of the House with regard to Private Bills as regulated by the Standing Orders made at the close of the last session (1847), so far as relates to the constitution of the Select Committees, is as follows:—

The petitions complaining of non-compliance with the Standing Orders are now tried before officers of the House appointed by the Speaker for that purpose, called *Examiners of Petitions* instead of by the *Committee on Petitions* as heretofore, the duties of that Committee having come to be considered strictly of a judicial nature, as already mentioned.

All questions of dispensing with the Standing Orders (when the decision of the examiners is against the promoters of the bill) are, as before, referred to the Select Committee on Standing Orders. This reference is not made by way of appeal from the decision of the Examiners of Petitions. The matter is referred to the Select Committee on Standing Orders, as a committee having powers of a discretionary character, who, *upon the facts found by the examiners*, are to report to the House whether such Standing Orders as have not been complied with ought or ought not to be dispensed with, and whether in their opinion the parties should be permitted to proceed with their bill or any portion thereof, and under what (if any) conditions.

To this Committee, also, are referred all petitions to the House praying to be allowed to dispense with the sessional orders, or to take some step in the progress of a bill at variance with the Standing Orders.

The constitution of the *Committee on the Bill*, which has always been the great difficulty, and which, in the course of the last ten years, has undergone many changes, is at length settled as follows:—

All the private bills, after being read a first time, are referred to a committee, called the *Committee of Selection*, which consists of five members, viz. the chairman of the Select Committee on Standing Orders, and four other members nominated at the commencement of each session.

The Committee of Selection are to form into groups all railway bills, which in their opinion it is expedient to submit to the same committee; and they may in like manner, if

they think fit, form into a group any opposed bills which are not railway bills.

The railway bills (or groups) they are to refer to committees consisting of a chairman and four members selected by them not locally or otherwise interested therein.

The other opposed bills (or groups) they are to refer to committees consisting of a chairman and four members not locally or otherwise interested; and, if the bill (or group) specially relate to any one county or division of a county or borough, they are to add the members representing the same, or if more than one county, &c., such of the members as they think fit, provided that the number of members added in respect of local representation shall not in the case of any one bill exceed four.

The Committee of Selection are also to fix the first meeting of the committee.

Each member of a committee on a railway bill, and each of the members not interested of the committee on any other bill, is, before he can be allowed to act on the committee, to sign a declaration that his constituents have no local interest in the bill, and that he will never vote on any question without having duly heard and attended to the evidence.

The members added in respect of local representation are to sign a declaration that they will never vote on any question without having duly heard and attended to the evidence.

No member of a committee on a railway bill, and no member not interested on any other bill, is to absent himself from his duties thereon, except in the case of sickness or by order of the House.

Such is the constitution of the committees to which all opposed private bills are now referred.

The unopposed bills are referred to a committee consisting of the chairman of the Committee of Ways and Means, together with one of the members ordered to bring in the bill and one other member, not locally or otherwise interested therein, appointed by the Committee of Selection.

We doubt whether improvement in the constitution of the committees can be carried much further. We are aware

that persons, whose opinions are entitled to great respect, have thought that the duties discharged by the Select Committee on the Bill might be more satisfactorily discharged by a tribunal composed of judicial officers not being members of the legislature; but we see great difficulties in the way of any such scheme. Were the duties of the Committee *on the Bill* simply of a judicial nature, as were those formerly discharged by the Committee *on the Petition*, we should see no objection to allowing those duties to be discharged by judicial officers, as has been done in the case of petitions complaining of non-compliance with the Standing Orders. But the duties of the Committee on the Bill are not of a judicial nature merely: they are inquisitorial and legislative rather than judicial. We do not see how a judicial tribunal, such as has been suggested, could proceed in the execution of duties of that nature. A judicial tribunal is always supposed to be instituted to try some definite question. The institution assumes that there is *a law*, and that the judges are to try a question of conformity or non-conformity with *that law*. But there is no law which determines the questions coming before the Committee on the Bill, or which defines their duties, except in so far as they are prescribed by the Standing Orders, which is to a very small extent only. They are all questions about *a law to be made*, the private acts being in the nature of exceptional laws, and the main question in each case being, first, the expediency of passing the proposed new law (which the committee inquires into under the form of *voting the preamble*), and next, the limitations by which, if granted, it ought to be guarded. Now these are in their nature questions of judgment and discretion, and not of law, and they could hardly be appropriately referred to the decision of a judicial tribunal.

We are far from thinking that a committee of five members of either House of Parliament is in all cases competent to deal satisfactorily with these questions; but, looking to the peculiar nature of the duties to be discharged, we are unable to devise any more appropriate tribunal. If the private business is to remain a part of the business of the legislature, and we confess that we are not prepared for so great a con-

stitutional change as would be involved in its withdrawal, we do not see what better course can be taken with those mixed questions (involving with questions of principle questions of disputed fact, and matters of detail) which cannot be conveniently discussed and decided by the whole House, than to refer them to a select number of the members of that House, chosen, we will suppose, with some reference to their fitness for the discharge of the particular duty devolved upon them, acting with the discretion which belongs to them as members of the legislative body, representing, as it were, that body in little, with greater aptitude for the examination of evidence and the discussion of matters of detail, but with the discretion and deliberative freedom belonging to the larger body. This, at least, appears to us to be the constitutional course; and before this is departed from we think, at least, the experiment should be fairly tried, how far a body so constituted, with all such helps as may legitimately be afforded them (and which hitherto the Committee on the Bill have not had), may be enabled to discharge its duties in a satisfactory manner.¹ The committees cannot hitherto be said to have had any fair trial. Duties have been expected at their hands, and that without any assistance, which, as we shall presently show, it was utterly impossible that they should be able to discharge. From a large portion of these it is the object of the *Consolidation Acts* (the history

¹ So far we quite agree with the writer of this article. In the argument which we have submitted to our readers on this subject, we have stated our willingness that a fair trial should be given to the Select Committee on the improved plan above stated, but also our opinion that judicial officers under the direction of parliament must eventually be appointed. But on this, as on all other subjects, we are desirous that the fullest discussion should take place. Of course we think so well of our own opinions, that this is the best mode of testing their soundness. It is to be observed, that if the duties of the committee are materially lessened, if they have power to direct inquiries on the spot, as is subsequently proposed, *post*, p. 314., and if a standing chairman on private bills is appointed, all these alterations may so improve the powers and constitution of the committee, as, in fact, to make it quite a different tribunal from the present one, and thus our object may be accomplished, although not in the manner that we have proposed. On the subject of the standing chairman of private bills, the evidence of Mr. Booth, the counsel to the Speaker, before the Committee on Private Bills of this session, is worthy of attentive perusal. — Ed..

and nature of which we are about to state) to relieve the committee; and when we see how much has been accomplished by these acts of the task hitherto supposed (in theory at least) to be performed by the Committee on the Bill, our wonder is not so much that the committees should have been unable to discharge the duties expected from them, as that it should ever have been thought possible that they should be able to execute any such duties.

Without some such aid as that to be derived from the Consolidation Acts, we hold it to be utterly impossible for any committee, however perfect its constitution, satisfactorily to discharge the duty hitherto expected from it; we mean particularly that important, but comparatively neglected, branch of its duties which commences after the question of the preamble has been disposed of, and which consists in examining in detail the provisions of the bill. The object of these provisions is, on the one hand, to facilitate the accomplishment of the purposes aimed at by the promoters of the undertaking, and, on the other, to guard against any unnecessary interference with private rights, and to provide that in all cases in which such interference takes place compensation be made. It has been considered the duty of the committee to see that the bill contains those provisions. How was it to proceed? Let us take the case of a railway bill, as such bills were drawn a few years back, and let us suppose it to be referred to a select committee of members, the most learned, the most upright, the most intelligent, the most diligent of any to be found in the House. We will suppose the preamble proved; how was the committee then to proceed? There was laid before them a thing called a Railway Bill, in extent a folio volume, consisting of a confused mass of clauses, of enormous length and endless tautology, relating to a great variety of matters, and thrown together without order or plan; in short, to borrow a quotation once wittily applied by Lord Brougham to a like production in the House of Lords, a

"Monstrum horrendum, informe, ingens, cui lumen ademptum."

There were clauses regulating the constitution and proceed-

ings of the company by which the undertaking is to be carried on. There were clauses regulating the acquisition of the lands required for the undertaking. There were clauses regulating the construction of the railway, and the management and working of it when completed.

Under each of these heads endless questions might be expected to arise, affecting the interests of individuals whose property was interfered with, and those of the public generally, all of which had to be considered and adjusted, and to provide for which would constitute a little code in each case. And who was to suggest these points to the committee on behalf of the public? The promoters of the bill would of course be mainly anxious to secure to themselves as large a measure as possible of the powers necessary to enable them to carry on their undertaking, and could hardly be expected to be very careful to see that the exercise of those powers was guarded by provisions, framed with a due regard to the interests of the public, seeing that every such limitation would be at their own expense.

The distinction in this respect between a private bill and a public bill is always to be borne in mind. The party bringing in the public bill is aiming at some public advantage,—he is proposing to amend a law for the general good. The party promoting the private bill, on the contrary, is aiming at some private advantage, and this often at the expense of the public. The proceeding, therefore, requires to be watched with an extra degree of vigilance on the part of the public.

If we suppose the committee endowed with all the intelligence and all the industry that belong to mortal men, and disposed to do their duty, how was it possible, with the time and means at their command, that they could see that all the powers conferred on the promoters were duly limited and qualified, and all the provisions inserted which the protection of the rights of individuals and the interests of the public require?

Take as an example the clauses relating to the lands which the railway company are empowered to take; how many interests require to be provided for? There are lands in settle-

ment, lands in lease, lands on mortgage, copyhold lands, lands subject to rights of common and charges of all kinds, lands belonging to corporations of various kinds, to trustees for charities, to married women, to infants, to persons absent. The interests of all these parties require to be protected, and can only be protected by provisions carefully prepared, and providing in detail for every case that can arise.

How is it possible that any committee, however well disposed, however intelligent, however diligent, could adequately consider and provide for all these cases?

But committees are not of this laborious character, and cannot be expected to be endowed with this extraordinary degree of intelligence. And in practice it is well known that committees never attempted this elaborate examination of the bills. When the question of the preamble (which was commonly the great subject of contest) was decided, their labours were supposed to be mainly at an end. Some few questions might be raised by individual opponents of the bill, seeking the introduction of special clauses for their own protection, and these, if not settled by compromise, as was most frequently the case, the committee must determine; but further than this, except where special inquiries were referred to the committee, or special clauses required by the Standing Orders to be inserted, the committee in general did not trouble themselves. And it is no wonder; their duties are quite sufficiently onerous, if they confine their attention to what is special in the bill before them, without attempting to determine all the general law applicable to the undertaking,—a duty for which they must feel themselves utterly incompetent, and which ought never to have been imposed upon them.

It is manifest, then, that if some expedient, more certain than to rely on the vigilance and intelligence of a select committee, were not resorted to for ensuring that the powers conferred by local acts were duly guarded, the passing of these acts would in a great number of instances be attended with the most flagrant violations of justice.

Something of this sort had been aimed at by the Standing Orders, requiring certain clauses to be inserted in certain

bills. But these could reach but a very little way. This, however, was all that had been in any formal or regular manner done for protecting the various interests which we have suggested prior to the passing of the Consolidation Acts.¹

It is true that matters were not in practice left quite so much to chance, as, for any provision to the contrary made by the Standing Orders, might have been supposed. There did exist a set of precedents of the several kinds of bills in common use, known about the House of Commons by the name of "Model Bills," which had sprung up of late years few people knew how², and which enjoyed a sort of mysterious authority among committees, and a certain degree of conformity with which was supposed to be required, and by some committees was insisted on in the bills that came before them. And no doubt the use of these bills, imperfect and unauthorised as it was, did effect a very considerable improvement in the private legislation, and obviated some of the evils which had before existed.

This was the state of things when the great increase in railway speculation, which began to manifest itself towards the close of the year 1844, forced on the attention of the Government the absolute necessity of taking some step for lightening and simplifying the labours of the legislature and its committees in dealing with the great mass of railway bills which were to be expected in the next and subsequent sessions.

¹ The system of *breviates*, which had been instituted some few years before this time (viz. a printed statement of the short contents of each private bill, with occasional remarks prepared by an officer appointed for that purpose by the Speaker, and circulated with the votes), could serve little further purpose than to enable committees more readily to seize the scope of the bills coming before them, and to point out here and there some glaring imperfection in a bill. Indirectly, the institution no doubt was attended with very beneficial effects; but as a correction of the evil discussed in the text it was almost inoperative.

² It is understood that these bills were prepared by the respective counsel to the Speaker of the House of Commons and the Chairman of Committees of the House of Lords. They were printed by the printers to the House of Commons, with the sanction of the Speaker, but do not appear to have been ever at any time formally recognised by either House of Parliament.

Two courses were open to the House: the one was to put the *model bills* on an authorised footing; and, after perfecting them, to require them to be followed in all cases, by providing by the Standing Orders that every private bill, in so far as it departed from the authorised precedent, should on the face of it show the departure either by a different type or in some other manner, so that the committee might be able at a glance to see which of the provisions in the bill before them were in conformity with what had been before approved, and how much was new. The other was to pass acts in the nature of the *Consolidation Acts*, which are, in fact, nothing more than the Model Bills improved, and thrown into the form of General Acts, so framed as to admit readily of incorporation with the local bills.

We do not purpose to discuss the comparative advantages of these two schemes. Whichever of them may have been the better, the adoption of one or other had become indispensable, and the government of the day selected that of the Consolidation Acts; and we incline to think they adopted the best course. It has greatly the advantage on the side of expense.¹ And it is also to be borne in mind, that it is much more difficult to evade the operation of the provisions which we have shown to be necessary for the protection of the public, when they are contained in a General Act, and can be escaped from only by substantive clauses introduced into the local bill, expressly excepting or modifying any of those provisions, than if the whole are left to be inserted together in the local act. It is also not a slight advantage that these general provisions being contained in public acts are accessible to everybody, and thus parties whose property

¹ The question of expense is by no means an unimportant one. Indeed, it seems doubtful whether, if the Consolidation Acts had not been passed, the necessary printing and ingrossing of the bills after coming out of committee could, in the years 1846 and 1847, at any expense have been accomplished within the time that could have been allowed for that purpose. Certainly it could not without a complete derangement of the printing establishments and ordinary business of the law stationers of the metropolis. Perhaps it were not to be regretted if the railway business in 1846 had in this way been brought to a dead lock; but, at all events, it would have been not a very legitimate mode of correcting the evil of over speculation in railways.

is liable to be affected by any projected undertaking, know beforehand, and without waiting for a copy of the bill, how their interests are likely to be affected, and what is the compensation to be granted for any interference with their property.

The experiment was first tried with the railway bills, the great pressure being in that part of the Private Business.

It became obvious, however, when the provisions usually contained in local railway acts were reduced into a general form, and classified with a view to being thrown into the form of a General Act, that a very large portion of those provisions were not more applicable to a railway than to various other kinds of undertakings. These provisions were found to consist of three main classes or groups: one group relating to the constitution and proceedings of the company by which the railway is to be carried on, — another to the lands required to be taken for the railway and works, — and the third to the construction and management of the railway. With regard to the first two groups, — viz. those relating to the company, and those relating to the lands, — not only were they not peculiar to any *individual* railway, but they were not peculiar to railways at all. They were equally applicable, the one group to all undertakings that were to be carried on by an incorporated joint stock company, the other to all undertakings where lands were required to be taken. It was, therefore, an obvious expedient, instead of having one general act which would have been applicable to railways only, to have three general acts, — the one containing all the provisions common to railway undertakings, except those for the regulation of the company and the acquisition of lands, and the other two containing, respectively, the provisions applicable to those two last-named objects. By this means the two acts last mentioned might be made available for other undertakings as well as railways. If the object were to authorise a railway, all the three acts would have to be incorporated with the local bill. If to authorise a dock, a cemetery, or other undertaking to be carried on by an incorporated joint stock company, or for which lands were required to be taken, either or both

of the other acts might be incorporated, as the case might require.

The three acts, the *Companies Clauses Act*, the *Lands Clauses Act*, and the *Railways Clauses Act*, were accordingly passed in the early part of the session of 1845, and were incorporated with the several local railway acts passed in that session; and they have been incorporated with all railway acts since passed. And not only were they adopted in the case of new undertakings, but in all cases where any railway company required an act to amend their existing acts, it became the practice, instead of incorporating the old acts relating to the company, to repeal those acts (saving the rights of all third parties under the repealed acts), and in their stead to incorporate the Consolidation Acts, so as to put the old companies upon the same footing, with regard to the constitution of the company and the management of their railway, as the new companies; and in this way it has come to pass that, with, we believe, scarcely a single exception, all the railway companies in the country are constituted alike, and are subject to like regulations with regard to the general management of their undertakings. This of itself we consider no unimportant effect of the Consolidation Acts. It is manifestly a great advantage to the large class of persons desirous of becoming shareholders in the various railway undertakings, to know what is the general nature and constitution of the body of which they are about to become members, and also to know that their constitution has been framed not entirely at the caprice of the governing body.

No further Consolidation Acts were passed in the following session: but the Select Committee on Private Bills appointed in that session, having recommended that the principle of the Consolidation Acts should be extended to other undertakings, a series of bills was prepared and brought in during the last session with the sanction of the Government; and all these bills, after undergoing in the case of the more important of them a very searching scrutiny before a Select Committee of the House of Commons, were passed by both Houses, and are now the law of the land.

The following are the short titles¹ of the acts so passed:—

The Harbours, Docks, and Piers Clauses Act, 1847.

The Waterworks Clauses Act, 1847.

The Gasworks Clauses Act, 1847.

The Markets and Fairs Clauses Act, 1847.

The Cemeteries Clauses Act, 1847.

The Commissioners Clauses Act, 1847.

The Towns Improvement Clauses Act, 1847.

The Town Police Clauses Act, 1847.

The *Commissioners Clauses Act* resembles in its purpose the *Companies Clauses Act*, being intended to be applicable to all undertakings carried on by a body of commissioners, or persons other than a joint stock company; the other acts above enumerated are upon the plan of the *Railways Clauses Act*. We think that these, with the former Consolidation Acts, comprise nearly all the kinds of undertakings which can with advantage be made the subject of general acts; and we congratulate the conscientious members of Select Committees on Local Bills on the passing of these acts, and that they are at length relieved from a very irksome duty, which it was hardly possible for them to discharge satisfactorily, and which, we think, ought never to have been imposed upon them.

The Committees will now, so far as the details of the bill are concerned, be restored to their legitimate functions. They will have to consider only what specially belongs to the bills coming before them. The general acts containing all the provisions which *primâ facie* and in ordinary cases

¹ The expedient of giving a short name by which the acts may be cited, has, we believe, for the first time been adopted in the Consolidation Acts. We cannot help thinking that there are many other of our public acts which are the subject of frequent citation, to which the same expedient might usefully be extended. Take, for example, the "*Act to amend the Law for the Trial of Controverted Elections of Members to serve in Parliament.*" How much more simple if the various warrants under that act were to commence with the words "by virtue of '*The Controverted Elections Act, 1844*'" (or some such title), than according to the common form, "by virtue of '*An Act passed in a Session holden in the 7th and 8th Years of the Reign of Her Majesty Victoria, intituled An Act, &c.*'"

may be assumed to be applicable, the committee will only have to consider of any proposed omission or modification of those provisions under the special circumstances of the case before them, and any other matters that are special to the individual undertaking. The way is, at least, cleared for a fair trial of the committees under their reformed constitution, and for determining how far they are capable of satisfactorily discharging their proper and legitimate duties.

But, though much has been accomplished by these acts, and though the labours of the committees will be very much simplified, we still doubt whether their duties can be discharged with perfect satisfaction, without the assistance of some public officer or some department of the government watching the proceedings on the part of the public. In the case of public bills brought in by private members of parliament, it is, we believe, the practice of the government to watch the proceedings, so that nothing may be done detrimental to the public. We think there should be the same kind of vigilance in the case of private bills; and as this cannot be conveniently exercised *in the House*, we see nothing for it but that some responsible officer or department of the Government should undertake the duty of watching the proceedings before the committee.

It may be said that it is the duty of the committee to watch over the interests of the public; and no doubt they will do this so far as they are able. They will watch over the interests of all parties, as well those promoting as those opposing the bill, and the public generally; but as, in the first place, the committee is a fluctuating body, and not, therefore, to be expected to acquire any great experience, and as, in the next place, the committee do not themselves take the initiative—sitting rather to deliberate on the matters propounded to them, than to take any active part themselves—it must often happen that if there be a party active in the conduct of the inquiry on the one side (and *that* with interests, perhaps, at variance with those of the public), and no corresponding activity on the other side, the interests of the public will suffer; and we cannot but think that it is the duty of the

Government to make provision for guarding against this evil.¹

We have heard it urged, as an objection to the system of the Consolidation Acts, that the committee in dealing with the local bill, not having the clauses bodily before them, do not know what they are doing: they are legislating, it is said, in the dark, and have not the same facility for judging how far the provisions which, by virtue of the incorporated act, will form part of the local act, are proper provisions, as they would have, if the provisions were set forth at length in the bill before them. We admit that, if the local bill were something novel in its kind, and were going to be considered for the first time, and the committee were really going to examine in detail the several clauses contained in it, there would be considerable force in the objection.² But this is not the

¹ Since the above was written, an important resolution has been come to by the House of Commons (December 21st, 1847) in compliance with the recommendation of the Select Committee on Private Bills of this session, "That the Chairman of the Committee of Ways and Means do examine the private bills, whether opposed or unopposed, and do call the attention of the House to all points relating thereto which may appear to him to require it." This we look upon as a very important step in the way of improvement; and we entertain a confident hope that, through the instrumentality of this standing chairman on private bills, aided, as he may be expected to be, by the suggestions of the different departments of the Government, each in relation to the bills connected with its department, a very valuable control may be exercised over the promoters of private bills; and that the want adverted to in the text may be to a great extent supplied.

² In expressing an opinion in favour of the Consolidation Acts, we wish it to be understood with the limitation that they be confined to the purposes for which they were intended, *i. e.* to be incorporated with *local acts*. An attempt was made in the last session to extend the use of them beyond these limits. What is called the *Towns Improvement Act* was proposed to be incorporated with the public bill known as the *Health of Towns Bill*; and very strong objections were expressed to this proceeding. We do not propose to examine the force of these objections, but we may observe that the Consolidation Acts were not framed with a view to being so used. They were not intended to have any operation until called into action by some *local act*, passed with a knowledge of all the special circumstances to which the provisions of the General Act were about to be made applicable, and when, therefore, an opportunity would be afforded of making the necessary modifications, if any were required. They were framed upon the supposition that they would be modified by the local act whenever necessary; and it may reasonably be supposed that many of the provisions contained in them would either have been omitted altogether, or guarded and

case. The committee do not in practice consider the provisions in detail; nor is it desirable that they should do so. The clauses which it is complained are not before the committee are not clauses specially applicable to the undertaking which is the object of the bill before them; they are equally applicable to all undertakings of the like kind: these provisions are, in fact, in the nature of the *general law*, subject, no doubt, to be modified in any case under special circumstances, but which *primâ facie* may be assumed to be applicable to all like undertakings. And what the committee have, in fact, to do is, to consider whether there are any special circumstances in the case before them rendering a departure from the general rule necessary; and for this purpose the general provisions may be considered even more conveniently when contained in a separate act than if set out in the local bill.

There is no more difficulty in understanding the application of the provisions of the general act to the undertaking proposed to be sanctioned by the local bill when they are contained in a general act to be incorporated with the local act, than if the provisions were set forth in the local bill itself.

The difference in the method of framing the local bills in the two cases is mainly this. In the one case the local bill sanctions the undertaking in question subject to the provisions "hereinafter contained;" in the other, subject to the provisions "contained in the said incorporated act." The object is, for instance, to sanction the making of a railway. In both cases the local act authorises the company to make a railway from A to B, "in the line laid down in the deposited plans, and to take such of the lands delineated in the said plans, and described in the books of reference, as may be necessary for that purpose." So far the two acts are alike. But the exercise of the powers so given is qualified

qualified, if it had been contemplated that the act was to take effect at once and to have a general operation. Again, none of the advantages specially aimed at by the system of Consolidation Acts were to be gained by incorporating the act in question with a public act. The proceeding was attended with all the disadvantage and none of the advantages that arise from the incorporation with a local act.

in the one case "by the provisions *hereinafter contained*," in the other "by the provisions *contained in the said incorporated acts*." The provisions themselves are in each case quite general in their language; and it can make no difference, in the labour or difficulty of construing them, whether they be contained in the same act which gives the power to make the railway, or in a distinct act. If the provisions be equally well drawn, they will be in the same terms and in the same order in both cases, and the only difference to the committee, or to the judge, or other persons concerned in the construction of the act, will be between taking the clauses from a volume with which they are, or may be, familiar (at least the judges may be assumed to be so), and one with which they are not familiar. But the misfortune is, that if the provisions are left to be set out in the local bill they will not be in any two acts in the same terms, or in the same order, and it becomes necessary, therefore, for the judge on each occasion on which any question arises as to the powers of a railway company under the act, to read through all the clauses of the local act, in order to collect what those powers are. Similar questions may have come before him twenty times under other local acts of the same class; and though in all the twenty cases the provisions ought to have been alike, and the mastery of them in one case ought to have been good for all, yet in this, the twenty-first case, the judge has imposed upon him the same labour of collecting the effect of the local act, as in the twenty preceding cases; whereas, if the clauses are contained in a public act, and the same set made applicable in all the cases, the judge becomes familiar with them, and when any question arises before him he is prepared at once to apply the law to the particular circumstances of the case.

A certain degree of skill and attention will, no doubt, be required in so framing the local bills, and adjusting them to the Consolidation Acts, as that they may consist well together, and form an harmonious whole. But we apprehend the difficulty on this head will be less than has been supposed. If the Consolidation Acts have been carefully prepared, they will contain nothing but what in general will be applicable to an

undertaking of the class to which they purport to apply. The special matter to be introduced into the local bill will be, not so much in contradiction to, or modification of, the provisions contained in the General Acts, as simply in addition to those provisions. As to these clauses there can be no difficulty. And where modifications are required, as will sometimes be the case, nothing more is necessary than to insert clauses containing the modification ; and as the Consolidation Acts provide in terms that they are to be applicable to the undertaking authorised by the local act with which they are incorporated only, so far as they are not varied by that act, there will be no conflict between the two.

The practice of incorporating former acts in private bills is any thing but new. Not to mention the precedents of the General Turnpike Acts and General Inclosure Acts, a session never passes without a great number of local acts being passed, incorporating the provisions of former local acts. When application is made for a bill to authorise some extension of a work already sanctioned by Parliament, the constant practice has been to introduce a short bill (similar in structure to those now used with the Consolidation Acts), authorising the new undertaking, and incorporating therewith the provisions of the act which authorised the original undertaking, and declaring that those provisions shall be applicable to the new undertaking, save as modified by the latter act. Here, therefore, all the objections which are applicable to the scheme of incorporating the Consolidation Acts are equally applicable, but with greater force ; because, in the case of the Consolidation Acts, the clauses have been framed with a view to being incorporated ; whereas the former local act has been framed only with a view to the individual undertaking which it was passed to authorise. We admit, however, that the argument to be drawn from these precedents is not a conclusive one ; because, if the difficulty of construing acts so framed is so great as to outweigh the advantages (which, it must be admitted, are many and obvious) to be derived from general acts, such as the Consolidation Acts, the practice which has existed of incorporating former local acts in new

acts when applied for, is a vicious practice; and the General Turnpike Acts and the General Inclosure Acts, instead of being followed as precedents, should be repealed, and the old practice recurred to, of setting out in each local bill for authorising a turnpike road or an inclosure (if we are to have any more inclosures under local acts) all the multifarious provisions applicable to those undertakings.

We, however, deny that there is any force in the objections that have been urged. We feel persuaded that with Consolidation Acts carefully prepared, and confined to matters to which they are suited¹, no difficulty of construction need be apprehended beyond that which is inherent in all legislation; and whether we regard the task of the Legislature in passing the acts, or that of the judges in construing them (to say nothing of other considerations), we do not hesitate to say that the advantage is greatly on the side of the system of Consolidation Acts.

The plan or scheme of the Consolidation Acts is somewhat novel. With a view, we suppose, of avoiding circumlocutions, and making the acts as easily intelligible as possible, the clauses are framed as if they were applicable to individual existing undertakings. The clauses of the Railway Act, for example, speak of "the railway company," "the railway," &c., as if they were individual existing objects; and in the interpretation clause with which the act sets out, these expressions are declared to apply to the railway, &c. authorised by any local act incorporating the general act.

Where the Consolidation Act relates to the taking of lands, or some other purpose that may belong to various kinds of undertakings, the expressions "the undertaking," and "the promoters of the undertaking," are used instead of "the railway," "the railway company," &c.; and in the interpretation clause the words, "the undertaking," and "the promoters of the undertaking," are defined to mean the undertaking or works authorised by any local act incorporating the general act, and the persons by that act authorised to execute the same. Each act commences by enacting that it is to have no

¹ See note, *ante*, p. 304.

operation until incorporated with a local act¹, and then it is to be read as part of that act, and its provisions are to apply to the undertaking authorised by it, save as modified by the local act. It then proceeds as if it were dealing with an individual undertaking, and the clauses are, with the difference which we have mentioned, almost *totidem verbis* the same as would be used in the local act if the Consolidation Act were not incorporated.

The acts so framed are without any operation until called into action by being incorporated with some local act. When they are incorporated, it is the local act which authorises the undertaking and confers the powers necessary for exercising it, those powers being to be exercised subject to the regulations contained in the general act, except in so far as they may be varied by the local act.

There are one or two other peculiarities in those acts to which we are desirous of calling attention. We have, in a preceding note², adverted to the short titles given to each of these acts, as a means of citing them in other acts or in legal documents.

But the most remarkable peculiarity is the subdivision of the acts into heads or chapters as it were. Instead of a continuous series of clauses running through the act, each beginning with the phrase, "And be it enacted," the clauses are arranged in groups according to their subject-matter, and the phrase "And be it enacted" occurs only at the head of each of these groups, preceded by a short description of the subject-matter of the group, so as to mark the commencement of each new group. The division of acts of Parlia-

¹ This, unhappily, is not the case with the three Consolidation Acts first passed. The House, in Committee, altered the clause so as to make the acts in terms applicable to all future undertakings authorised by Parliament. This seems to have been done under a notion that by this means the promoters of local acts could less easily evade the provisions of the general acts. The step so taken by the Committee was at variance with the whole spirit of the acts, which was to enact nothing at present as to future undertakings, but to leave it to be determined when any local act was passed, and when the local circumstances were known, whether it would be expedient to adopt the provisions of the general act, and if so, whether with any and what modifications.

² *Ante*, p. 302.

ment into clauses has always been of an extremely arbitrary nature. As at a very early period it was found convenient to subdivide the entire statute of the session into separate chapters or acts with distinct titles, so it was found convenient to make a subordinate division of each chapter or act into clauses, by the expedient of repeating the words "And be it enacted" at the beginning of each such subordinate division; and in the printed copy of the act these clauses are numbered, and the short substance of them noted in the margin. The original intention of this division probably was, that each clause should embrace some entire division of the act: and in the simplicity of the earlier acts this might be the case. But as the acts became more complicated it was no doubt found that to make each clause complete in itself, that is, to make it embrace all that related to its main subject-matter, would often make the clause run to an inconvenient length; and the practice was resorted to of further subdividing the clause; and this further subdivision seems to have been made entirely at the caprice of the draftsman; some draftsmen preferring the style of long clauses, some that of short ones.

The divisions, or clauses, are simply so many rests in reading through the act; and though, no doubt, the further subdivision has some advantages, yet it has this signal disadvantage, that the clause no longer marks the leading divisions of the act. The act is one dreary waste of continually recurring clauses, one resembling another. Even if the clauses be arranged in a logical order, there is nothing to inform the eye when any new division of the subject begins, nor where it ends. But, unfortunately, the clauses are not commonly arranged in a logical order. They are too frequently thrown together without order or plan, the draftsman seeming to consider that his duty requires nothing more than that the necessary clauses be found somewhere in the bill. And, again, as clauses are frequently added in committee, or some other stage of the progress of the bill through the Houses of Parliament, and as there is nothing to mark the place where such clauses may most conveniently be inserted, the result frequently is an entire confusion throughout the act. You

know not where to find any provision of which you are in search, and, when you have found it, you know not in how many other parts of the act clauses relating to the same matter may also be found. This has been particularly the case in private acts; the usual method of drawing which has been said to be (and from the result the statement may readily be believed) to cut out of former acts relating to a kindred subject whatever clauses are found suitable to the purpose in hand, and to put these together in whatever order gives least trouble to the draftsman. And we speak without exaggeration when we say that we have seen acts in which, if the clauses so cut out of former acts had been shuffled as a pack of cards, scarcely greater confusion would have reigned through the act.

The effect of the expedient which has been resorted to in framing the Consolidation Acts, is to mark the leading divisions of the act. As the phrase "And be it enacted" never occurs but at the beginning of the new division, we know at once, when that phrase occurs, that the preceding division is exhausted and a new one begun; and so the eye runs through the act, seizing at a glance its leading divisions; and as each of these subdivisions is preceded by a few words indicating its subject-matter, a great facility is afforded for mastering at once the general scope of the act or studying its provisions in detail. Thus, in the Towns Improvement Act, for instance, we have, "With respect to making and maintaining the public sewers, be it enacted as follows:"

"And with respect to the drainage of houses, be it enacted as follows:"

And so on, the string of clauses relating to each of these subjects following as a series of rules or orders under the head to which it belongs.

This method of marking out the divisions of the act has, no doubt, a peculiar fitness in the case of the Consolidation Acts, since it enables the committee, when it is proposed in the local bill to insert any clauses relating to any of the matters regulated by the general act, to turn with facility to that part of the general act; and it also affords facilities for incorporating with the local bill portions only of the Con-

consolidation Acts. But we think the same principle of division might usefully be extended to other acts. Besides the facility which it affords for reading the act when passed, it is useful to the legislature during the passing of a bill, as marking out the place where amendments may conveniently be made. A transcript of the several headings being attached as a fly leaf to the bill, the members are enabled to turn readily to that part of the bill where all the clauses relating to any given subject are collected together. Moreover, it constrains the draftsman to attend to the arrangement of the subject-matter of his bill, and to put things in their proper places.¹

The different headings which we have mentioned do not form part of the clauses; the sense of each clause being complete, without reference to the introductory words. The headings, therefore, have no effect on the construction of the act any more than if they were so many marginal notes. They merely indicate the arrangement of the subject-matter. No doubt, if the act be not carefully drawn, the clauses may be so worded as that the introductory words may be necessary to complete or explain their sense; just as it may be necessary to resort to the preamble, to explain what is not clearly and unambiguously expressed in the body of the act. But this is rather the fault of the draftsman than of the system. So, also, if the division of the subject-matter be imperfectly made, and the headings inaccurately devised, persons may be misled by them, and it would be better in that case that no system of arrangement at all had been attempted. But because a bad arrangement may be attended with inconvenience, it is surely not a sufficient reason for not attempting an arrangement which, if good, is attended with so many and such manifest advantages.

We are disposed, therefore, to think that, in the case of most of the longer and more complicated bills introduced into parliament, the system of division and arrangement of which the example has been set in the Consolidation Acts

¹ We have in a former article gone at length into the question of the style of acts of parliament, and the importance of uniformity in the structure and arrangement of the clauses. See Vol. III. p. 257.

might be adopted with great advantage; and we commend them to the consideration of the draftsmen of our legislature accordingly.

As connected with the subject of the foregoing article, we cannot refrain from saying a few words on the act passed at the close of the session of 1846, and commonly known as the *Preliminary Inquiries Act* (9 & 10 Vict. c. 106.), an act, which, for want of the necessary machinery for giving effect to the very important purposes aimed at by its framers, has, we fear, proved worse than abortive.

The act provides, that, in the case of all the classes of bills there enumerated, such a preliminary inquiry shall be made by officers appointed by the Commissioners of Woods and Forests, or by the Admiralty (or both), as those boards respectively shall direct.

This inquiry is to embrace, —

A local examination and survey of the district which the proposed act will affect and of the neighbourhood :
Inquiries relative to the extent of the provisions of the proposed act; and an investigation of such other matters relating thereto as the board shall order.

After the examination the board are to report thereupon to both Houses of Parliament.

It seems that the Commissioners of Woods and Forests and the Admiralty, pursuant to this act, appointed various surveying officers (consisting, generally, of a barrister and a civil engineer in each case) to go down to the neighbourhood of the several undertakings, and there to collect evidence in the manner prescribed by the act; and they furnished the surveying officers with a scheme of the several heads of inquiry upon which evidence was to be taken. The inquiries were made accordingly; and the report of the surveying officers, with the minutes of the evidence taken in short-hand, were laid upon the table of each House of Parliament, and by the

House referred to the several committees sitting on the bills to which the inquiries had reference.

It does not appear that either House of Parliament either approved of the heads of inquiry that had been selected by the Commissioners of Woods and Forests or the Admiralty, or authorised the committee to adopt the evidence which had been taken by the surveying officers upon those heads, or the conclusions to which those officers had arrived. And accordingly the committees for the most part seem to have been at a loss to make any practical use of the reports referred to them; and all the expense incurred in the inquiry must, we fear, in a great measure have been thrown away.

Assuming, what seems generally admitted, that in many cases an inquiry on the spot into the merits of the bill might usefully be made, the question is, under what regulations the inquiry should be conducted, so that the results of the investigation may be made available for the purpose intended. That purpose is, that the evidence collected on the spot may be such as to satisfy the committee (and, if the occasion arise, the House) as to the propriety of passing the bill (*i. e.* in committee *voting the preamble*), and as to whether the provisions contained in the bill are proper. With a view to this, it seems necessary that the inquiry should be conducted under the control of the Houses of Parliament, and that the Houses should, by standing orders, provide for giving effect to the results of the inquiry when obtained. At present the inquiries which are to be the foundation of legislation are conducted under the direction, not of either House of Parliament, but of a Government department.

The great difficulty, no doubt, would be, to determine the matters as to which the local inquiries are to be made, and in what cases it is necessary that there should be a local inquiry; because, if these are to be determined by the Standing Orders, they must be general in their nature, and applicable to all bills of the class to which they relate, as there would be difficulty in leaving to officers of the House a discretion such as that which may be exercised by a committee when it has the individual bill before it. It seems, however, that the heads of inquiry furnished by the Commissioners of Woods and

Forests and the Admiralty to their officers (and published in the appendix to the Third Report of the Select Committee on Private Bills of last year) were of a general nature, and not framed in each case with a view to the individual undertaking. If we can assume that the heads of inquiry thus prepared were proper for the purposes intended, as to which we abstain from giving any opinion, there can be no doubt that, with the aid to be derived from what has been done by the Commissioners of Woods and Forests and the Admiralty, Standing Orders might be framed, defining the inquiries proper to be made with respect to several classes of bills, and the Standing Orders might provide that evidence should be taken on the spot with respect to those heads of inquiry, by officers appointed in some manner to be approved by the House (just as has been done with respect to the question of compliance with the Standing Orders) instead of by a committee, as formerly, a short act being passed, if necessary, to enable the officers to take evidence on oath; and it would further be necessary to provide by the Standing Orders to what extent the reports of the officers, or the evidence taken by them, should be binding on the committees, and under what regulations further evidence might be received by them.

With regard to the existing act, we cannot but think that it is the duty of the Legislature either at once to repeal the act, or to provide, by means of Standing Orders, for making the inquiries of the officers appointed by the Woods and Forests and the Admiralty effectual.

ART. VI — LORD HARDWICKE.

The Life of Lord Chancellor Hardwicke, with Selections from his Correspondence, Diaries, and Judgments. By GEORGE HARRIS, Esq., of the Middle Temple, Barrister-at-Law. 3 vols. 8vo. Moxon. Stevens and Norton. 1847.

FREQUENT as is the observation, it is not, therefore, the less true, that the biography of a public man must often tend to misrepresent him, from the scanty materials for narrative, afforded by his early life, and the disproportionate attention paid to the latter part and close of his career. If this, then, is true of the biographies of men who laboured long in the attainment of a public position — of men who, like Somers and Camden, came not into their earliest publicity until half their life was spent — how much more pertinent is the saying in the case of the early favourites of fortune — of the men who, like Hardwicke, were all but at the head of their profession before three decades were passed, and who for an equal period enjoyed the highest place and the greatest power that rank, talents, and their profession could afford!

The latest biographer of the great and good chancellor — and to him none will now deny those epithets — has felt this deficiency. With all the advantages of family records and family traditions, the early career of young Yorke cannot be extended beyond a few pages; and we still know little and care less for the subject of our author's laborious work, until he comes forward as the pet of judges, the politician, the public man, the political partizan, the most likely successor to the highest honours of his profession. Lord Mansfield considered the career of Lord Hardwicke the most worthy subject for an ambitious writer. It is, indeed, a beacon light of brightest promise to writer, imitator, and reader.

The future Lord Hardwicke was Philip Yorke, the only son of the town-clerk of Dover. He was born on the 1st of December, 1690, and was descended by his father's side from

a respectable family of East Kent, by that of his mother connected with the historian Gibbon. Though more than two hundred acres of land about River and Lidden belonged to his family, young Philip was born in far from affluent circumstances, and had only the results of his own industry to look forward to. His father was a man of too little consequence to insure the tradition of any characteristic parts which might be traced in his child; and the same obscurity of position rendered the childhood and schoolboy days of his son equally without traditional anecdotes. The letters from his schoolmaster bear witness to his scholarship and to his position in his master's opinion¹; but they add not a whit to the few relics of his individual character. From Mr. Morland's school at Bethnal Green, young Yorke removed to the offices of Mr. Salkeld, an attorney in Brooke Street, Holborn, in about his sixteenth year. There, too, was the future chancellor of Ireland (Jocelyn), a future Master of the Rolls (Strange), and a future Chief Baron (Parker). Among these associates Yorke lived and worked for several years, probably after he was called to the Bar. In those years he read hard, noted down judgments, analysed cases, and yet did not neglect more general accomplishments, and successfully attained the then great literary honour of contributing a letter to the *Spectator* on foreign travel. The views which he then put forward in a humorous form, were afterwards in later years, when his advice was sought on all sides, repeated in sober seriousness: it is no longer Philip Homebred, the anonymous writer, but my Lord Chancellor proffering, and my Lord Annandale receiving, that advice.

"To these" (nobility and men of quality) "I presume travelling will succeed, not only from the reason of the thing, but the fashion of the times; and it were much to be wished that being the fashion were not, for the most part, the only aim in it. It is undoubtedly in itself a noble part of instruction, as it affords an opportunity of

¹ In one of these letters an amusing mistake shows how necessary local knowledge is, even in the most trifling matters. His school-fellows, "Ashleius, Papilio, and Johnidius," (1. 17), are converted into Ashley, Butterfly, and Johnny. A Kentish man will recognise Papillon of Acriss in the Butterfly, by one of whose family indeed the letter is franked.

becoming acquainted with the constitutions and interests of foreign countreys, the courts of their princes, the genius, trade, and general pursuit of their people. But as things are now managed, what is often substituted in the room of these most useful inquiries? Nothing but the infection of their vices and luxury; their arts of dressing themselves and their victuals; and, consequently, the acquisition of a false vitiated taste in both. One fundamental error is travelling too early. The mind of a young man wants to be fitted and prepared for this kind of cultivation; and, until it is properly opened by study and learning, he will want light to see and observe, as well as knowledge to apply, the facts and occurrences met with in foreign countreys." (Vol. i. pp. 393, 394.)

This may seem sad antiquated twaddle in these days when, so soon as July comes to an end, from every quarter of the Island, English stream over the Continent, and, whether educated or not, fitted or unfitted, regard their wanderings as something of infinite worth, and smooth their young chins, and talk glibly of hard names, gathered from guide books, and fair views stolen from illustrated tours, whilst the wise-looking seniors enunciate certain platitudes about the advantage of foreign travel. Lord Hardwicke was not far wrong when he wrote, "without this foundation, a boy may be carried to see one of those idle shows, called 'Moving Pictures,' or 'The French Court in Wax-work,' with almost as great advantage, and more innocence;" and his advice to his son, the soldier in Flanders, might with reason and benefit be printed on the outside of every red book of the ubiquitous Murray—"Remember, that whoever goes into a foreign nation stands entrusted with some part of the honour of his country, not only in respect of his bravery, but of the morality and politeness of his behaviour."

Ritornare a bomba.—In May, 1715, Yorke was called to the bar by the Benchers of the Middle Temple, and set up his business tent in Pump Court. Already recommended to Lord Macclesfield by Mr. Salkeld, Yorke soon obtained a junior crown brief in an Anti-Jacobite case, and in the next year appeared in his patron's court in an important suit. From the first it is evident that his business was considerable; but it is not until his third year that his name begins to figure in

the reports, and his logical method of arguing recorded in the careful volumes of Strange. It is refreshing to recur to the days of these reports, when one kind of argument chiefly occupied the talents of the advocate and the attention of the judge.

"In Sir Philip Yorke's time, lawyers and judges were far less bound by precedent than they are in these days. Hence, on the one hand, greater inducements were held out to argue and to decide cases entirely from principle; and consequently, also, to study this more deeply, and to cultivate the mind more assiduously, for dealing with pursuits of this nature. Longer time was also allowed, owing to the less intricate nature of our laws, for general study, and for turning attention to the higher authorities connected with this science, and referring to them on all occasions. Had Bacon and Hale lived in these days of multitudinous decisions and reports, and new acts of parliament and rules of pleading, it is impossible that they could ever have found leisure to enter so much into the world of general literature; to store their minds so fully with knowledge, and to give so many of their researches to the public." (Vol. i. p. 246.)

Argument from first principles has long since given way to that from decided cases and precedents:—resorted to originally by men of strong memories, but inferior intellect; the use of the argument from precedents has gone on, producing every day more and more inferior professors in the art. Mere technical legal knowledge and acquaintance with cases is regarded with favour by the judge, because it shortens work, and consumes less time than an appeal to principle; and is cultivated by the lawyer as a ready means of progress within an average intellect. The aim now is, to become an animated digest, and judges meet principle with precedent. The most important cases, where apparently principle is every thing, go off on a point in the case, readily snatched at by the judge, who too often seems to watch with an unhealthy eagerness for such a means of avoiding a complete decision which must involve the delivery of reasons. And this has brought on the profession a perfect flood of reports. Not only are the old reports of the several courts swelled out to a most embarrassing and costly size, by the introduc-

tion of useless cases, but dozens of half and quarter bred reports run a race with each other in supplying hasty records of the last case in Banc, or the latest dictum of my Lord at Nisi Prius. Our text books are too often mere pilings up of case on case, without the deduction of a single principle; and when an author does, like the late Mr. Smith, fly to principle rather than precedent, the legal world regards him as a wonder, and even judges speak of him with praise. We do not attack the use, but only the abuse, of case learning and case law.

Yorke's progress was so rapid, that not only his brethren of the bar, but those of the bench, were puzzled to account for it. Up to this time he was only the forward junior, envied by his equals, and sneered at by his leaders. His had been no chance success, placing him at once in a prominent place, but the strong and steady progress which must ever reward the man who is worthy of the support his friends give him, and obtains the support of which he is worthy. Quite as many men have been wrecked by being pushed forward before they were fit for their work, as have been crushed by neglect. It is the gradual increase of work, in quality and quantity, proportioned to the strength, that develops the great mind, and makes it rise to the duty it is called upon to perform. When the high position is attained, how changed is the scene!

"Until a man," says our author, "whether in the ranks of a profession, or in the world at large, proves his superiority to the multitude about him, he must expect to be opposed on all sides, and at every step he presumes to advance, he is looked upon as a pretender and interloper. But when he has once forced his way through the throng, he is immediately welcomed as a friend, and the opposition he so lately experienced is now turned on those who would stand in his way. The strong stream of prejudice, against which his utmost efforts were lately required to enable him to struggle, at length bears him forward as irresistibly. Universal homage is done him. Whatever he utters is wisdom; every common-place idea bears the impress of genius; every production of his mind is considered of high value." (Vol. i. p. 88.)

Courted by the government, doubtless on the Chancellor's

recommendation, Yorke soon entered parliament, and aided his professional reputation by a few sensible speeches on such subjects as came within his province. In May, 1719, he added to his legal influence by the marriage of the niece of Sir Joseph Jekyll, and to his happiness, in the domestic as well as intellectual qualifications of his pretty widow. Practice breeds practice, as money breeds money, and there is as little necessity as there is reason for accusing Yorke of resorting to unfair means of obtaining the ample practice which fell to his share, and warranted his stanch friend to press on the king his appointment as solicitor-general in the following spring.

Resting on the authority of his biographer and anecdote gatherer Cooksey¹, it has been a common custom with writers to charge Mr. Yorke, not only with the neglect of his old friends when he advanced in the world, but with a disregard even of his nearest relatives. Now it was the misfortune of one of the young solicitor-general's sisters to marry a Mr. Jones, a man of apparently large landed property in Cornwall, but in reality a spendthrift, and all but a bankrupt. The Wimpole MSS. fortunately contain several portions of the correspondence between the brother and sister when the position of Mr. Jones had become so embarrassed, that pecuniary aid was absolutely needful. And, though to persons who are unaccustomed to the formal mode of address which prevailed in those days, even between the nearest relatives, the almost stately nature of the letters would suggest a want of brotherly affection, the facts they present prove that the young lawyer's purse was as ready as his advice; and that constantly, even against the remonstrances of friends and relatives, he came forward liberally to the assistance of his dissipated and embarrassed brother-in-law. Many a reader will be surprised at the formality with which the various members of the Hardwicke family address one another in their letters during the earlier years of the Chancellor's

¹ Apropos of Cooksey and his anecdotes, it would have been better, perhaps, when quoting (i. 240.) that given on the authority of old Mr. Bentham, to have noted that it was not the *veritable* Jeremy from whose letter the anecdote is quoted.

career. The sister writes to her brother as "Dear Sir," and he, in all probability, replied with "Dear Madam;" in after days, my Lord addresses his eldest son as "Dear Mr. Yorke," and he and all his brothers reply to their father as "My dear Lord." It is a great error to construe such language into any proof of a want of feeling—it was the custom of the age, and even now the sons of the peer to whom all men look up, write to him with the same formality, and yet without any lack of feeling. So far as the charge of neglect of friends is concerned, the immediate promotion of Jocelyn, and the eventual bringing forward of every fellow pupil, is the best answer.

It is not to be contended that the new solicitor-general was a great parliamentary orator: it is equally erroneous to suppose that he was regarded with contempt in the brilliant assembly which then constituted the House of Commons. Yorke was always listened to with attention, and never spoke without preparation and effect, and was always deemed worthy of being answered by some eminent opponent.

Many things which in these days are spurned as commonplace, in the days of Walpole were regarded as novelties; and though the stiff, formal, essay-like speeches of Yorke, both in the Commons as well as in the Lords, would now hardly be heard with patience, it was not the custom, especially of the Upper House, in those days, to attach so much value to sharp personalities and epigrammatic sentences, as to laboured and learned speeches. Lord Hardwicke's present biographer seems to have the taste of the era of his subject; he consequently sets more store by, and has a higher respect for, the Chancellor's eloquence, than would be accorded to it by the political speakers of the present age.

"The failure of lawyers in Parliament, more particularly in the House of Commons, has now become almost proverbial. Nor do the causes of this appear so very difficult to unravel. The close, methodical, technical style of reasoning which the legal science engenders, so different from the ordinary mode of rhetoric or argument, contrasts entirely with the loose irregular system of the House of Commons: and it must be admitted that lawyers often exhibit a want of comprehensive views and of enlarged principles,

which the pursuit of law as a practical avocation, if not largely corrected by other studies, tends much to foster. Besides this, men of this class, whose minds have been engrossed by their profession, and who have not been accustomed to look much beyond it, come ill prepared, either as regards general information or knowledge of business transactions out of the strict province of their profession, to meet the representative assembly of a nation. The common error that people seem to fall into is that of supposing that because a barrister, of all persons, has the most practice in public speaking, he, of all persons, ought therefore to be best calculated to shine in an assembly, the entire business of which is carried on through the medium of oratory. Now all this would be very correct if the House of Commons were strictly and purely a rhetorical assembly ; if skill in oratory and real eloquence and excellence of delivery constituted the chief object of attention there, and the attainment of this formed the main end in being elected to that body. The former of these is, however, no more the case than the latter.

“ Some of the leading debaters there, who are most attentively listened to, are remarkable rather for the want of all the ordinary leading qualifications of a great orator ; while some really accomplished orators are heard with impatience. The fact is, that it is the matter, not the manner, that is there regarded. Beautiful ideas are despised, in comparison with extended information ever so rudely conveyed ; and comprehensive views obtain a decided preference over the choicest originality of conception ; and even at the bar, mere rhetorical skill avails far less, and the want of it is much more easily dispensed with in the generality of cases, than by strangers might be supposed. Were the House of Commons the oratorical academy of the nation, all this would doubtless be very deplorable. But as this motley assembly is called together only for the purposes of business, and its duty is to decide on certain practical questions submitted to it, its existing condition is not at all a subject of lamentation. Hence, however, in a great measure, it is, that the refined subtleties, the adroit distinctions, the clever reasonings, and even the impassioned appeals of the practised advocate, so entirely fail in their effect on this august assembly.

“ When Sir P. Yorke's friend and correspondent, James Harris, took his seat in the House of Commons, Charles Townsend enquired of some member who he was ; and being told in reply that he was a gentleman who had written on the subject of logic and

grammar, he exclaimed, 'Why does he come here, where he will hear nothing of either ?' (Vol. i. p. 3.)

The retirement of Lechmere from the attorney-generalship made no change in Sir Philip Yorke's position ; considered, perhaps, as too young for so exalted a post, Sir R. Raymond was placed over his head, and his onward progress delayed for a time. The cases of *Layer* and *Bishop Wilson*, and the bills of pains and penalties against *Atterbury*, *Kelly*, and *Plunkett*, called forth the professional acquirements of Yorke, and tended to prove his fitness for a higher position, which was so soon to fall to him. Hardly had he been three years in office, before the death of *Sir Thomas Bury* left the chief barony vacant, and placed the Attorney-General in the King's Bench, in the room of *Sir Robert Eyre*, who had been raised to the head of the Exchequer. Sir Philip now succeeded to the vacant attorney-generalship.

During all this onward progress, Yorke's earliest patron, Lord Macclesfield, had held the seals. Rumours of bribery and mismanagement of funds in Chancery began to creep about ; gradually the murmurs increased, until at length, in the end of 1724, the Great Seal was put in commission, and the new holders were distinctly warned by the King to see to the accounts of the Chancery Masters, and do the suitors justice for their peculations. Rapidly the plot thickened. The purchase of their places by the Masters became well known, and eager to fix the guilt on the right man, Parliament indemnified the purchasers by an act, on condition of their discovering all their transactions with the late Chancellor. An impeachment of Lord Macclesfield soon followed, and Sir Philip, unwilling to appear against his earliest patron, obtained permission from the House to be excused from being the manager of it. That he confined his conduct to this, has been made the ground of many a hard word against him. Mr. Harris thus defends this conduct, which, to say the least, fully satisfied the one most concerned with it, Lord Macclesfield himself : —

“The conduct of Sir Philip Yorke with respect to his friend and patron, the Earl of Macclesfield, on the occasion of his fall,

had been sometimes made the subject of animadversion ; but those who have censured him have not attempted to define exactly in what way he acted incorrectly, or to state what course it would have been proper for him to pursue. That he did right in not allowing himself, even in his official capacity, to be employed against this nobleman, can hardly be doubted ; though had he not been so scrupulous, both excuses and precedents, and (in one instance, at least,) a very high authority, might have been found for this course : and it is evident that the Government, by their hesitation to release him from this duty, did not consider that, under the circumstances, he should have refused to act in his capacity of Attorney-General, as the leading counsel against the unfortunate Earl. Ought he then to have stood forward as the champion and defender of Lord Macclesfield, who, on such an occasion, required his assistance, and who had befriended him, and even incurred such odium by the extent to which he had done this, when such patronage was of the highest importance to Yorke, and to which he was actually indebted for his present high position ?

“Independently of the anomalous situation in which, as the first law officer of the Crown, he would have been placed by this course, there were two great objections to it. In the first place, by allowing the Attorney-General to appear on behalf of Lord Macclesfield, the Government would seem as though they desired to shelter him ; or, at any rate, it could not be supposed that they were very anxious that the charge should be fully investigated as the case imperatively demanded. And in the next place, connected as Sir Philip Yorke was with Lord Macclesfield, it might have afforded a belief, had he thus stepped out of his course to defend the Earl in such a case as this, that he had been connected with him in the nefarious practices of which he was accused, a suspicion of which has never yet been even hinted at by any one. True, indeed, it is, that Lord Macclesfield’s patronage of Yorke had more especially, and more especially his promotion of him to the Solicitor-generalship, excited odium against the former, and may have contributed to add fuel to the flame which was then raging against him : but this, though it deserved his warmest gratitude, could not demand of him the neglect of his duty, either public or private. A man is in honour bound to defend his friend — above all, one to whom he is under obligations, — against unjust attacks ; and this Sir Philip Yorke did not fail to do openly in the House of Commons, where he endeavoured to procure a miscarriage of the prosecution by opposing a re-commitment of

the articles of impeachment, as already stated, and where also he vigorously repelled the personalities of Sir Thomas Pengelly and other private enemies of the Chancellor, during the very heat of the contest, and when his friend's cause was most overwhelmed with odium ; but he is not bound on all occasions to stand forward as his friend's supporter where he has been guilty of base and unjustifiable conduct in cases in which the other had no concern. Besides, the patronage which Lord Macclesfield had bestowed on young men of merit was not only no part of his offence, but formed the only substantial portion of his defence, or rather extenuation of the ill conduct of which he had been guilty. Had Sir Philip Yorke resigned the Attorney-generalship, and devoted himself to the cause of his fallen patron, he could have had no chance of serving him, the facts of the case being clear beyond a doubt, as was also the gross misconduct of Lord Macclesfield in acting as he did ; and the Attorney-General, by giving up his office, must have necessarily lost a large share of the influence which he possessed while holding it, and which he was enabled to exert in mitigation of the efforts of the enemies of Lord Macclesfield." (Vol. i. pp. 176, 177.)

The death of the King in June, 1727, made no difference to Sir Philip : with his colleagues he was reappointed to his old post, his fitness for which was not now questioned, even by his opponents. His varied knowledge shone brightly in the great prosecutions which he conducted for the Crown, as well as in the elaborate arguments with which he swayed the Judges ; and in prosecuting Woolston for blasphemy, he received from the prisoner a satirical compliment for the theological knowledge he had arrayed against him at the trial. In 1733 Lord Raymond died, and the chief justiceship of England was immediately offered to Mr. Attorney General. The proud Duke of Somerset had at once pressed for his appointment, and the Duke of Newcastle was equally ready to accede. The newspapers of those days seem not to have been more accurate in their reports than in these times. At first the leading journal of that age named every one but Sir Philip as likely to succeed to the vacant seat. After a few days the journal announces the actual appointment of another ; at last the name of Sir P. Yorke creeps into notice, but still no appointment, and the papers, fairly puzzled, become full

of new rumours. Spring, summer, and autumn gone over without an appointment, until at last in November the Lord Chancellor vacates his place, and the two highest judicial honours are vacant at the same time. The negotiations that had been long going on, ended in Sir P. Yorke taking the chief justiceship, whilst his Solicitor General, Talbot, passed over his head to the woolsack. The consideration seems to have been an increase of salary and a peerage, besides the permanency of the one position as compared with the ministerial tenure of the higher office. From the estate which he had long since purchased in Gloucestershire, he assumed the title of Baron Hardwicke.

“The great eminence and distinguished success of Sir Philip Yorke at the bar, in each department of the profession, would lead the generality of persons to expect that, as a matter of course, a corresponding degree of fame would attend his career on the bench. In a vast variety of instances, however, anticipations of this kind, formed upon a very careful observation and perfect knowledge of the skill of the advocate, have been entirely disappointed; and it has not unfrequently happened that the most brilliant counsel have proved but very indifferent judges; while men who were their inferiors as advocates, when raised to the bench, have shone forth beyond their contemporaries there, and greatly excelled those who far outstripped them at the bar. Nor is this at all to be wondered at, when we consider the vast difference in the duties which the two stations demand; requiring not only abilities and qualifications of quite another kind, but, in many respects, a totally distinct order and cast of mind. In each, indeed, great natural talents, extensive legal acquirements, a good store of general knowledge, and a sound discriminating judgment will, of course, be essentially serviceable; but many of the most brilliant accomplishments of the counsel — the ingenious sophism, the ready reply, the well-pointed satire, the eloquent flow of language, and captivating address, — will be quite lost and useless on the bench; while the sounder qualities of the mind — the habit of comprehensive examination, and careful investigation of the whole bearing of a case, the dispassionate inquiry and penetrating judgment — which were not generally perceived in the advocate, in the judge may shine forth in all their lustre.

“But not only do the endowments of the successful barrister

vary greatly from those of the eminent judge, but the practice of the former is by no means in all respects beneficial as a preparation for the duties of the latter. The partial opinion which he is accustomed to form at once of every case he is engaged in, the unsoundness of many points to which he is wont to resort, the deficiency of comprehensive ideas which he acquires, the aptness to imbibe in one particular direction a strong bias or prejudice, are great and serious impediments to making an able judge out of a leading advocate. Indeed, in some great advocates, the judicial qualities of the mind seem to have been almost entirely extirpated by this habit, by taking always a one-sided view of the case, which appears to follow them to the bench, and characterises their manner of summing up each cause. In the case of Sir Philip Yorke, — whose qualifications as an advocate mainly consisted in his sound knowledge of law, and whose comprehensive way of dealing with an argument resembled more the tone of the judge than the advocate, joined with a peculiar moderation of demeanour on all occasions, — these disadvantageous influences did not operate so largely as in many others. Besides this, the offices of Solicitor and Attorney-General, in which he was engaged during by far the larger portion of his career at the bar, are, to a certain extent, of a judicial nature, involving not only the advocacy of the causes they had to plead, but the determination as to the merits of many matters on which they have officially to advise before they are brought to trial, and in giving their opinion on many different points submitted to them in cases where their decision is almost tantamount to a judgment in one of our courts. In this latter capacity, Sir P. Yorke was very extensively employed, as is shown by the vast number of professional opinions by him, on different points, now in the possession of his descendant among his papers at Wimpole. Perhaps also the having so soon obtained a seat in the House of Commons, and accustomed himself to take a part in their debates, where more comprehensive reasoning is requisite than the mere advocate is wont to resort to, and matters of general interest are argued and dealt with, may not have been without its use. But probably the chief advantage which he possessed was in being raised to the judicial bench at so comparatively early an age, before his mind had become warped and had imbibed habits which, after long usage, could not without great difficulty be laid aside." (Vol. i. pp. 260—262.)

It is not in the House of Lords that the speeches of a

chief justice are to be looked for, or even wished. Doubtless cases must arise in the multifarious debates of such an assembly as seem peculiarly to require the interference of law lords, and the respect with which such opinions are received might often tend to promote in them the desire and the habit of frequent debating. Happily, however, from the best times of our law, the ennobled members of the profession have ever considered the danger which must accrue to the majesty of their office, if the shadow of political partisanship should pass upon it. The best and worthiest among them, when they have passed from being the official advocate in the Commons to the judges' seat and the peers' coronet, have left behind them the style and feeling that became them as a partisan, and assumed the port and dispassionate demeanour of the Judge. Such, too, was the conduct of Lord Hardwicke. In the House of Commons he had never been a violent partisan, though still a firm defender of Walpole and his measures: when he spoke as Chief Justice it was always with reluctance, and far more as a judge than as a peer; and when again, as Chancellor, he passed into partisanship once more, the judicial habit of thought and manner remained stamped on his demeanour.

His judicial charges deserve the praise which his biographer has bestowed on them, for clearness, correctness, and decision, and his political bias never obtrudes itself. To that general fear of the king over the water and his party, rather than to his own particular feelings, must be ascribed the place which Lord Hardwicke assigned to the silly gunpowder plot of July, 1736. So acute were all eyes then in the discovery of Jacobitism, that the explosion of a loose paper of powder in Westminster Hall, and the scattering of sundry written caricatures on some late measures, readily assumed in the eyes of the Royalists the form of a deep laid conspiracy. The "audacious act of sedition" would now-a-days be laughed at as a mischievous trick and ill-contrived joke; but with the recollection of the year '15 in their minds, and the Porteous riot before their eyes, men talked themselves and the King into the belief of new mixed plot of powder and papers. My Lord's good sense could not but see the absurdity of the

powder part of the plot, and led him to lay the stress of the conspiracy on the paper portion thus spread about the Hall and scattered before the seats of justice.

Talbot, to whom Hardwicke had already given way, was not destined to exclude his contemporary from the Seals for many years. Early in 1737, the Lord Chief Justice was sitting as his *locum tenens* as Speaker in the Lords, and as one of the Commissioners of the Great Seal; on the 14th of February Talbot was dead, and the chancellorship at the refusal of his old companion. Within a week Hardwicke had accepted the Great Seal, and as some delay followed in the selection of his successor on the Bench, actually held and exercised in public the two greatest judicial offices of the kingdom. Ambitious as Hardwicke was of the chancellorship, the change from a certain to an uncertain post weighed much with him, and he certainly did not accede to the wishes of Walpole until he had secured the reversion of a good place for his son, if he did not play with the offer, as Horace Walpole relates, until the minister threatened to place a bitter Tory on the woolsack.

Among the appointments in his gift was one which secured an income to the poet Thomson, and exacted from him no return. The poet, a stanch Tory, and adherent of the heir apparent, and therefore opponent of the Crown and its ministers, was too proud to ask for a continuance, the new chancellor too proud, if not too politic, to give an office to an opponent without at least a solicitation. So Thomson lost his pension, and, happily for posterity, took again to his pen, and the censorious had one more fact to cite against the fortunate Chancellor in proof of his neglect — almost his despoliation of letters and literary men. The rapid progress of Salkeld, Jocelyn, Lee, and Strange, easily refute Lord Hardwicke's supposed neglect of his professional companions; the researches of his present biographer (i. p. 523—5.) successfully sweep away the oft repeated accusation of his neglect of the clever, gossiping, anecdote-gathering Dr. Birch, with whom, from early years, the young Yorkes so freely associated. If he were to blame in this matter, it was in the abundance of countenance and promotion he accumulated on him. But

besides this, even during the life of the Queen, the Chancellor seems to have had enormous influence in the selection of men for the episcopate and other exalted positions in the church. The men who were thus gradually brought forward include Butler, Sherlock, Gibson, Pearce, and Hurd. This speaks well for the Chancellor's discernment. And if to Herring, whom he raised step by step, through prelacy to one primacy after another, cannot rank with such men, it must be conceded that he was in every sense a Christian scholar, and one on whom greatness was rather thrust, than sought by him.¹ In after days, when applied to by Dr. Doddridge to encourage a physician to enter the church by the promise of preferment, the Chancellor refuses with firmness and with reason, on the plea that he will not aid in making the prospect of preferment a reason for taking on themselves such high and holy duties. (Vol. ii. p. 376.)

The real position held by the Chancellor in the various cabinets in which he took part, doubtless varied materially with the circumstances of the time, and more so with the character of his colleagues. Walpole, like both the Pitts, and a certain modern statesman, ruled all affairs with such a high hand, that his brother ministers became rather the organs of the patronage than the depository of the power, and the regulators and originators of the policy, of their respective offices. Walpole bribed every one but himself, for the sole object of making every one his humble servant. That most amusing libeller, Horace Walpole, embalms Lord Hardwicke as the butt and bore of the council board; and yet, in those days, the haughty and unmanageable Newcastle frets himself because a secret is committed to the Chancellor before him, and confides to him that his situation in the Cabinet is so distressing, that "his only comfort, he can say with truth, had been the friendship and unreserved confidence he had hitherto honoured him with." Between Newcastle and

¹ *Nolo Episcopari* was a reality in those days. Not only do good men demur at being made bishops, and seek to be relieved from their episcopal duties, but when (as in 1747) the primacy fell vacant, London and Salisbury adhere to their *Nolo*, and York only retracts his on receiving a complete lecture from his old patron the Chancellor.

Walpole, Lord Hardwicke seems to have acted as mediator, as he did in after years between the duke and his brother Pelham. The strong sense and conciliatory manner of the Chancellor seem to have marked him out for a mediator from his very first entrance into his high office; the painful quarrel between the King and the Prince had called for all his talents and all his temper, and whilst designing men on both sides continued for years to fan the flames of dispute and discord, and rendered the gap between the party of the King and that of the Prince wider and wider, the Chancellor alone remained respected by both: regarded by the Prince as an opponent forced to be such by his conscience, and by the King as a friend, not only from inclination but from reason.

It must be allowed, that Lord Hardwicke's conduct respecting the appointment of Puisne Judges, is utterly at variance with present practice; but it must not be forgotten that we have no right to judge men of olden time by the practice and notions of our own age. Walpole, indeed, would have used these places for political purposes, for he contrived to keep several judgeships open, until remonstrated with by the Chancellor. (Vol. i. p. 485.) In this, perhaps, he was as much above the usual practice as he was below the present, in not insisting on no one having a voice in such a matter but the Chancellor. The same applies to his answer to a recommendation for a judgeship from a great lord, that he had already promised it; and his attempted recommendation of Noel for a like place, months after he had resigned the Great Seal. (Vol. iii. p. 110.) The worst that can be said is, that it would not be tolerated at the present time.

True to his Hanoverian feelings, loving his old dull electorate, and regarding his kingdom as little better than a treasury, the King took every excuse for deserting England, and leaving his Lords Justices to manage in his absence. It was during one of these visits, in 1741, that the smothered enmity between the Duke and Sir Robert broke out with such violence as to endanger the safety of the ministry. The Duke, eager for war—Sir Robert as eager for peace—the Duke pressing for vigorous measures—Sir Robert conciliating Spain—the Duke loud and firm against the Electoral Treaty, which the

King had signed in September—Sir Robert ready to acquiesce in it, though so long kept in ignorance of it. Then it was that the Chancellor—the man whose opinion the Duke admitted would determine both when the brothers disagreed—stept in once more as a mediator. By his means the threatened resignation ended in threats alone, and the brothers and Sir Robert once more appeared to pull together in the Cabinet.

But the days of the Walpole Cabinet were numbered; higher and higher rose the tide of opposition against them, and louder and more clear became the personal denunciations of the minister. In February, 1742, Walpole resigned office and accepted rank, and as he closed the door of power against himself, comforted himself that he had turned the key against his old opponent, by crushing his popularity under the coronet of an earldom. “Here we are, my Lord,” said the new Lord Orford to the new Lord Bath, as together they walked up the House of Lords, “the most insignificant persons in Europe.” The two leaders were out of office, and the new ministry went on with the average men of both parties.

In such a cabinet as that which now remained to rule, a man like the Chancellor rapidly assumed a position almost inconsistent with his official duties. King and councillors equally depended on his advice and his pen, and his duties ranged from penning king’s speeches, and every public document, to originating foreign policy, and bringing over his royal master to consent to the exclusion of his favourite Granville. With onerous duties in his court, packets of foreign correspondence to read, almost secret interviews with Bolingbroke to endure, a quarrelling cabinet to harmonise, and an obstinate sovereign to influence, the Chancellor lived on no bed of roses, and passed no life of idleness. With his former patron, Walpole, the Chancellor seems to have remained on the best of terms; ready, indeed, to do him a service, but not at the expense of propriety. Such a case as his refusal (ii. 96.) to appoint a Westminster organist to the commission of the peace of the county, as trenching on the usages of society to place on the same judicial seat the lord that said his prayers in St. James’s church in his pew,

and the organist who said his in his gallery, when the duties of his keys did not prevent him. The Hardwicke Papers afford some new sayings of the great ex-minister. "*Foot-hunting*," said Sir Robert, "is the perfection of skill in the art of hunting." "Give me a positive and I will give you a negative at any time." "Grant a man nine favours and deny him the tenth, and he will be as bitter against you as if you had denied him all." The following letter to Charles Yorke is highly valuable, as an over true sketch of a neglected minister, satisfied with the reputation he had earned, and disgusted with the neglect he had experienced from the master he served best: —

"Houghton, 24th June, 1743.

"DEAR CHARLES,

"I have now wrote to Captain Jackson, to give Lord Tyrawly a ticket, as you desired, and am very glad to oblige him with it.

"This place affords no news, no subject of amusement and entertainment to fine men. Persons of wit and pleasure about town understand not the language nor taste the charms of the inanimate world. My flatterers here are all mutes. The oaks, the beeches, and chestnuts seem to contend which shall best please the lord of the manor. They cannot deceive — they cannot lie. I, in return, with sincerity admire them, and have as many beauties about me as take up my hours of dangling, and no disgrace attends me because I am sixty-seven years of age. Within doors we come a little nearer to real life, and admire in the almost speaking canvas all the airs and graces which the proudest of the ladies can boast. With these I am satisfied, as they gratify me with all I wish, and all I want, and expect nothing in return which I cannot give. If these, dear Charles, are any temptations, I heartily wish you to come and partake of them. Shifting the scene has sometimes its recommendations, and from country fare you may possibly return with a better appetite to the more delicate entertainment of a court life. Since I wrote what is above, we have been surprised with the good news from abroad. Too much cannot be said upon it; for it is truly matter of infinite joy, because of infinite consequence.

"Dear Charles, yours, most affectionately,

"ORFORD."

From the Walpole MSS. Mr. Harris has disinterred a number of letters to the Chancellor from that deepest of

plotters, Lord Bolingbroke; commencing and ending with equal abruptness; they begin in the form of transmitting some letters of Duc d'Harcourt, relating to the Partition Treaty, and are carried on until after the suppression of the Rebellion in '45, when they suddenly cease. A key to many, if not to most, of the statements in these letters is wanting. Lord Hardwicke seems to have felt that this intimacy with Bolingbroke brought on him the reflexions and the envy of his colleagues, and appears to have never given even a hint of its objects to his favourite son. The main object of the letters is to communicate secret intelligence from France, through the means, in all probability, of Noailles; this is clear, and, according to Bolingbroke's showing, peace was as much sought by the good men in France as desired by us. But, besides this, there are, ever and anon, dark hints of persons at home — hints, doubtless, well understood by his correspondent, and rendered the more clear by the writer in the many interviews which he seems to have had with the Chancellor.¹

It was fortunate for this nation that the influence of so practical a man as the Chancellor, was so paramount over the King and among his colleagues, when the invasion of Prince Charles Edward suddenly burst on the country. Left as one of the Lords Justices during the King's trip to Hanover, perplexed by the divisions which existed among the members of this council, conscious of the absence of all cordiality between the absent King and his ministers, and particularly so of the delicate ground on which he himself stood with his sovereign, the Chancellor felt at one and the same time that every thing depended on him, and that every act of his would be scanned with jealousy, and judged solely by its consequences. The Hardwicke correspondence necessarily, therefore, opens up to a full extent the position of the country and the current of events during this singular crisis. It confirms the long sus-

¹ Respecting the expression *Votre Neveu* in the letter, p. 121., which we believe has troubled the author and his friends, we would suggest a comparison with the expression about Noailles in the letter, p. 113., and a hint that it may be a cypher for "*Votre Neveu*."

pected and long believed opinion, that the personal characters of the contending parties,—the courtesy and professed love for his country of the one, and the evident German preferences and foreign manners of the other, and unblushing sacrifice of English to Hanoverian interests,—weighed quite as much as hereditary right in the contest. The form and manner of government few cavilled at, and the Prince induced many a waverer to join his standard by professing his desire to retain it.

Though but a few thousand troops, chiefly foreign, were in the country, the rapidly increasing forces of the rebels were treated with derision, and even the landing of the young Prince questioned. "I cannot help agreeing," writes the Chancellor to the loyal and martial Primate of York, "with your elder brother of Canterbury, that in this case want of faith proceeds greatly from want of zeal, which in political faith is the worst source. There seems to be a certain indifference and deadness among many, and the spirit of the nation wants to be roused and animated to the right tone. Any degree of danger at home ought now to be vastly the more attended to from the state of things abroad. That I lament from my heart. I think I see the evil cause to which it is to be ascribed; and yet I know not whether to wish that, by the public, it should be attributed to that cause." (Vol. ii. p. 155.) Again, he hints at the King's perverse conduct after the invasion was certain.

"*Parturiunt montes*; but the mouse is not yet brought forth. It has vexed me heartily to be so called away from the very short but agreeable recess and pleasure, when I began to feel at rest, to attend the labour when the birth seems so far off. A certain person feels many pangs and throes; but I perceive plainly his principal midwife (Lord Granville) does not undertake to deliver him; and he, notwithstanding his partiality towards him, does not rely upon him. I have gone thus far in metaphor; and, indeed, I know not how to describe the scene upon paper, in plain words. Imagine to yourself a situation where a man wants to bring about what he sees is impracticable,—will not enable the old servants in his family to do his business, and yet is convinced that those whom he is more inclined to cannot carry it on,—wishing on

one side and embarrassing on the other,—and then you have the picture of our *present family*.” (Vol. i. pp. 161, 162.)

First among those who stepped forward to rouse the spirit of the nation, was the Chancellor's *protégé* the Primate of York. Not content with thundering from his primatial pulpit, he freely gave his wealth to aid, and his assistance to encourage, the loyalty of his city. “My gentle Lord of York assembles all his powers,” and perseveres in his course in despite of caricatures that dressed him in regimentals, and offers from six feet long Welsh curates to rally round his banner. His feeling was from the heart. When all Scotland had succumbed or rather welcomed the invader, and every post brought tidings of the onward progress of the rebels,—when, to use Charles Yorke's words, “the roads in Notts were crowded with gentlemen and ladies, and all the considerable families in the country were flying from it, so that the inns could not contain them, and many were obliged to sit by the fireside all night for want of beds,”—when dukes fled to Bath, and a Yorkshire merchant to the Hague,—then the Primate refused to leave Bishopthorpe to take his seat in Parliament, having “had a sort of remembrance that it would create some sort of uneasiness in his archiepiscopal city.”

Of the rebels, and the spirit that animated their councils and their army, the Hardwicke Papers afford much information. The following, we believe, is new:—

“As they went south, they committed greater outrages than formerly. They shot all the Marquis of Lothian's fallow deer, seven excepted; and when some of their chief officers called to them from the windows to forbear, they fired at them. These were Mac Donald's and [of] Keppock's men; and when Keppock was applied to, he answered he could not help it. They boiled the venison, and eat of it till they were sick; then sold the skins for a trifle.

“Though poor Lady Lothian got no sleep for two nights, while the deer were killing about her doors, she invited Lord Elcho, who, with his horse, were quartered on her, to a good bed in the house of Newbattle; but he answered that he was resolved to sleep in a hayloft till the restoration. The servant innocently repeated the message, that he was resolved to sleep in a hayloft till the

resurrection. However, the young lord got such a tooth-ache that night, that he was glad to get into the minister's house the next, and get his bed warmed, and warm drinks." (Vol. ii. p. 190.)

From the arrival of the Duke of Cumberland with the English regiments from Flanders, and the ill-timed retreat of the Prince from Derby, the amplest intelligence reached the Chancellor from his son, who was the Duke's aide-de-camp; and though the letters present hardly any new facts, they are written in so free and fair a style, that the reader best acquainted with the details of the time will peruse them with pleasure. That, indeed, in which Colonel Yorke describes the battle of Culloden, in which he bore his part, deserves insertion, had we room to afford it.

The event of Culloden called forth the Chancellor's powers in another form. At the trial of the noble rebels, he presided as High Steward, and afforded a new mark for the spleen of Horace Walpole. It is hardly necessary now to repel the accusation, that "he behaved so like an attorney on the first day, and a petty-fogger on the second," that George Selwyn, of execution notoriety, would not accept his broken wand to light a fire with; the careful record remaining of those proceedings refutes the sarcasm and establishes the falsehood. Neither can the powerful address and sentence on that vilest of rebels, Lord Lovat, be regarded as too severe or uncalled for. Indeed it is difficult to conceive any terms of reprobation as unsuited to the condemnation of a villain, who would have sacrificed his son to his own ambition, and who bargained with the Guelph whilst he held in his hand his patents from the Stewarts. The conduct of that trial called forth the legal acumen of the Judge, as well as the stern language of the condemner; and in few cases was the spirit of our law, that the untried is to be accounted as not guilty, more perfectly developed and contrasted with the view which the condemning Judge must hold, than in the opening address to the prisoner, and the closing speech to the culprit.

The sudden and lamented death of Mr. Pelham in 1754, again imposed on the Chancellor the weight of the govern-

ment and the choice of his successor. Unaccustomed as we are in these days to one of the legitimate uses of the Privy Council except on formal occasions, and to the obtrusion of episcopal council in political matters, the use made by the Chancellor of the Primate on that occasion is naturally surprising. In those days the sovereign had as much personal interest and power in the allocation of places to his councillors, as the world now attaches to the French King; and as the nomination to the Episcopate was always regarded as the private patronage of the Crown, and only subject to the advice of the minister, the influence of the episcopal members of the council was naturally important. The result of the Chancellor's plans was the elevation of the Duke of Newcastle to the Premiership. The means by which those plans were rendered successful will be found—at least one of them—in the Chancellor's letter to the Primate. (Vol. ii. p. 511.) One of the first results was the acceptance of an earldom by the Chancellor, an honour long before tendered, but rejected for prudential reasons.

When we consider that, for more than thirty years, Lord Hardwicke was a public man, for twenty of them he held the Great Seal, and that from the day of his resignation to his death he greatly influenced public measures, gradually, indeed, decreasing with the rise of Lord Bute's power, we do not expect to analyse with any minuteness such a career. We have done our best thus far: for the rest it must be but a glance. The well-known negotiations with Pitt are further illustrated in these volumes, and the patriotism of the great commoner does not gain in brightness by the published records. When his well paid—rather highly-bribed—silence, if not acquiescence, is contrasted with the dignified retirement of Newcastle, the loud patriot fails in the contrast. With a peerage, a pension, and an increased fortune, the one passes from patriotism to almost subservience. With a fortune generously diminished by his sacrifices, the other passes from power, despising the proffered rewards, ashamed to receive payment when considered unworthy of serving his country.

We have already remarked on the stately propriety of those days even between nearest relatives; let us not forget

the servility exhibited, in words, by the greatest men in their letters. We do not mean only the letters from ministers to their sovereign, though these contrast but poorly with the respectful manliness which a late ministerial crisis showed to pervade the present intercourse between the sovereign and her advisers; but we rather refer to the fulsome praise which men of equal rank and talents lavished on one another, and which warranted a man like Clive, in considering the approbation of Lord Hardwicke the greatest proof of the transcendent nature of his deeds. Such compliments were too common to be valuable, and smacked too much of the "dedication style" to deceive even the recipient of their adulatory phrases.

On the 11th of November, 1756, Lord Hardwicke resigned the Great Seal, on the retirement of his old and firm friend, the Duke of Newcastle. Though out of office, and firm in refusing to return to official life, either as Lord President or as Chancellor, Lord Hardwicke's power remained very great; and hardly a ministerial difficulty arose in which he was not called in, and of which he did not eventually complete the settlement. Within a year of his resignation he entirely reconstructed the Cabinet by his extraordinary influence; and it was not until after six years of retirement, as it was called, that he resigned his influence, and could say that he looked forward for the first time to read the King's speech, which he had been in the habit of writing for nearly thirty years. The position of the Ex-chancellor must have been truly gratifying, at last enabled to feel that he possessed a great and a powerful influence without the adjunct of office; and that he was justified in believing, to judge from facts, that he deserved the influence, not only which he then possessed, but which he had enjoyed when in power and place.

To how many of our great men is denied the gratification of witnessing the rise of descendants calculated to maintain the reputation earned by the departing ancestor. How few can look forward, with pride, to the day that shall consign them to the verdict of posterity, and leave the honours and the reputation of a race to the successor of the creator of both. It was not so with Lord Hardwicke. Well aware,

as he was, that to the exalted position of their father his sons owed much of the rapidity with which they had risen into notice, could he look with aught but honest pride on the position of Lord Royston as a politician and a scholar; of ill-fated Charles Yorke as a lawyer, and the marked successor to his legal honours; or of his military son as doing credit in arms and diplomacy to his own career. Ill-fated Charles Yorke — friend and honoured rival of the best jurists of France and Germany, ingenuous friend, honest partizan, too docile servant of your sovereign — who can read your proud, your fearful career, and not at once envy and pity you! It hardly required the feeling record of your last days, which the hand of your brother has left, to free you from the heartless charge of suicide. Rest thee in thy hollow grave, assured that thy brother's love was with thee at thy death, and that in these days the race of Yorke can say with pride, "he was our ancestor."¹

Singularly suited to the times in which he appeared, Lord Hardwicke had sufficient ambition to urge him to strive for pride of place and power, but not to lead him to mistake the by ways for the highways of fame. To a fine and courtly person, and a pleasing address, was added, in him, a sound memory, profound common sense, sufficient learning to refine his mind, but not to wed it to such tastes alone, a calm and imperturbable temper, strict integrity, and the power as well of comprehensive views as of acute and close reasoning. His knowledge rendered him acquainted with most subjects, and well able to form an opinion on them; but when he felt his knowledge to be wanting, he never pretended to that which he had not. Thus, if he did not shine as the sayer of sharp things and maker of good hits, he passed from early life to death without having made any great mistakes, or left a record of presumptuous ignorance.

The miscellanea of such a work as this are numerous and amusing. The Chancellor's idea on foreign travel, and his relics of Walpole's wit, have been already introduced. The

¹ The highly interesting career of C. Yorke will require a separate notice at a future time.

first that follows gives Charles Yorke's idea of what some young barristers facetiously call *working*. Dawdling in Court, under the plea of taking notes and hearing cases, he called "*a cruel time killer*." Who can deny it?

"Pope," writes Charles Yorke, in a letter of June 27th, 1744 (vol. ii. p. 89.), "was fond of Erasmus' principles in matters of religious opinion, and the last thing he said that had either sense or wit in it, was to Spence of Oxford, who attended him in his illness, alluding to this favourite character. Spence earnestly recommended him to call in another physician. 'No,' says he, 'I am weary of them. They have all mistaken my case, and a new one will but add new blunders to the former. It would be like quitting the errors of the Church of Rome for the errors of the Church of England.'"

There is nothing new under the sun even in local wit-ticisms. The Punch of this era is anticipated by the wit of a previous century, and finds his best joke even on poor broken-backed Westminster Bridge anticipated. For as the venerable predecessor of the present decayed proprietor of that passage and water-way was equally given to sinking and putting its piers deeper and deeper into the mud, so the standing joke among the wits of its day was, "How the poor Bridge passed the night." (Vol. ii. p. 344.)

To read the following passage, the reader might suppose Lord Hardwicke to be sketching off a scene in these our days. "I don't wonder," he writes to his son, "about the Senior Judge. Such starts and sallies are incident to his constitution; but I always thought it imprudent in a Judge to make himself unpopular with the Bar." (Vol. ii. p. 414.) In a Court where report says that Judge A. settles the law, Judge B. the facts, Judge C. the counsel, Judge E. the jury, and My Lord Chief unsettles every thing and every body, such a motto might act as a seasonable reminder.

The pro- and anti-Jew agitation calls for the introduction of the next specimen of ancestral wit. Commenting on some of the intended measures of the Cabinet in 1753, "there was printed in the London Evening Post, a *Jerusalem gazette*, for the year 1800, when the whole nation is supposed to be

converted to Judaism. One article in it was, that on such a day Mr. Attorney-General D'Acosta filed an information against somebody who had dared to write in defence of Christianity." (Vol. ii. p. 500.)

Except that our author is somewhat too familiar with the sublimities of common-place, and occasionally occupies a page with a string of most undeniable truths, there is, with one exception, nothing to object to in any portion of his book, which does not relate to its particular subject. He does, indeed, extol the dinner-giving system of the Inns of Court, which he considers approaching to perfection, but then at the end he states that some alteration of it is contemplated, and that lecturers may be appointed; and he admits that this also is excellent: so far, then, there is little to blame; but when he comes to consider the charges which have been repeatedly brought against Lord Hardwicke for his misconduct as a law reformer, Mr. Harris indulges in sentiments which satisfy us that he has been born considerably after his time. Indeed, the Law List and other evidence of equal credibility, have been absolutely necessary to remove a doubt that we entertained, that instead of being a rising junior of 1848, Mr. Harris should, in fact, antedate his time of life by at least a century. The commission which was appointed in 1729 "to inquire into the law offices and their fees," he gravely informs us, using it apparently as a justificatory statement, was allowed by Lord Hardwicke to continue during the whole of his chancellorship, the Chancellor taking no step either to hasten its labours, or to act in accordance with the information collected; and the author alludes to all this with much heavy jocularitv, without apparently seeing how much these facts make against his hero. Possibly, however, Mr. Harris only intends to joke when he intimates an opinion, that if any reform interfere with the profits of the profession it should not be proceeded with. If he is serious, we must remind him that by this course of reasoning, Harvey should not have injured the medical profession by divulging his discovery of the circulation of the blood, or Jenner have saved the lives of thousands by making his theory of vaccination known to the world.

It was from no lack of power to take a comprehensive view of a subject, that prevented Lord Hardwicke from enrolling himself in the number of law-reforming Chancellors. This is sufficiently proved by the notes which he made for a speech, on the general policy as to the alienation of land, on the introduction of the act 9 G. 2. c. 26., a part of which we gladly extract.

"Feuds—at first unalienable, afterwards to be kept undiminished—not allowed with^t licence or *great fines* paid.

"The Government became almost an aristocracy, and y^t of y^e worst kind—turbulent military aristocracy. Distress'd y^e Crown—oppressed y^e people at pleasure—y^e one an instrument in their hands—y^e other their slaves. History of the *Barons' wars* proves this. Admit they obtained many good laws fro' y^e Crown—by wise construction and exposition since applied to general liberty—at first intended to secure their own partic. *freedom* and *power*. In y^e reign of Ed^w I. they found their power decreasing—13 of his reign prevailed to gr^t y^e stat. of *entails*.

"This invested every owner of lands with y^e power to put you out of a capacity of being aliened, *even* with^t y^e licence of the Crown.—Mischiefs of this soon felt.—Several attempts in Parliament to repeal y^e law; but y^e men of great power in those days refused to consent.

"At last, ab^t 12 Ed. 4. the judges by a wise exposition—application of the rules, nay fictions of law—found out a method to make est^{es} tail alienable. Com. recovery yⁿ first introduced.

"In reign of Hen. 7. a prince of g^t foresight and policy, this doctrine of com. recoveries, aliening estates tail, was more fully established—new laws made introducing new facilities in barring estates tail. Fine now made a bar to y^e issue in tail.

"This, together with y^e stat. of population, y^e ground of w^t is commonly said of y^e prince's breaking y^e power of y^e barons. The happy consequences arising fr^o hence to y^e whole nation visible.

"The *Constitution* has been bro^t to a truer balance. Liberty has been much more generally diffused thro' y^e whole body of y^e people.

"The nobility are become a middle state—security to y^e Crown agst invasion of their liberties by the Crown. Trade and arts increased and flourished. Apply this. Have y^e Lordship's ancestor's, for national considerations, for y^e sake of public utility, permitted their estates to become alienable—parted with a g^t share of their own power. Will you suffer another estate of y^e kingdom to

go on perpetually increasing in unalienable property: or y^e same thing to arise in another shape of mistaken charity?

“*My other general reason, y^e general interest and trade of the kingdom.*

“What is y^e great incitement to industry and merit in trade, study, or y^e profession of arms? Founding families—if cut off from all opportunities of realizing¹, are scarce incorporated into y^e body of y^e people.”

We now close with regret a work of which our good opinion has already been manifested by the use we have made of it, and the extracts we have culled from its volumes. Strongly as the writer must have been prepossessed in favour of the subject of his work, from the kindness which he received from the “house of Yorke,” he has made his commendations with justice, and his defence with courteous manliness. To most of the standard accusations against the great man, his access to the Wimpole MSS. has enabled him to offer a decided answer; and with such success, where proof is ready, that he has, not without warrant, deduced a probable error where that proof in denial is not discoverable. We may say, however, that the work has too much of the elaborate workmanship of a Dutch painting to be fully appreciated, except by the family, and with the length to which it has reached many will cavil, and, in all friendliness, we would suggest reduction whenever a second edition is required of a work which so richly deserves it. What we would curtail are the extracts, doubtless to the point, from contemporary sources, such as those relating to Shepherd, Layer, and Wilde; a few, but very few, of the letters might be spared; but we would, by all means, retain the observations in defence of our profession with which the first volume is illustrated. They do credit to the feelings and sense of the writer.

But the praise due to such a work as this should bear no proportion to its mere literary merits. The materials it contains are of the greatest value, and the author, as well as the noble representative of the Chancellor, deserve great praise and great thanks for so valuable a contribution to legal history.

¹ Acquiring real property.

ART. VII.—THE NEW PILGRIM'S PROGRESS.

CHAPTER IV.¹

NOW I saw in my dream that Pilgrim, having bade adieu to Hopeful, proceeded on his way ; and here it may be supposed that some feeling of joy, if not exultation, would have stolen into his breast. He had accomplished his object ; he had maimed and driven away the monster FEUDALITY ; he had done the deed for which he had visited the land : he had so far baffled his foes, whether secret or open. But there was in that country a vale, called the VALLEY OF DESPONDENCY, and his road was through that vale, which was full of passing shapes and shadows. And as Pilgrim walked along, he entered this valley, and his feelings underwent a change ; he pined for some sympathy with his own inmost soul, and found none ; and if perchance he met a traveller, he was passed by unnoticed, or a look of hate or contempt thrown on him. This cut him to the quick. Where he had looked for praise he found none ; and he felt his heart die away within him. "How," cried he, almost in despair, "shall I proceed on my journey — how shall I overcome the other perils that attend it — how accomplish the ends for which I live ? I have roused the hatred of all, and have as yet done nothing. This monster, though maimed, may yet return : for this I have left all that is dear to life — wealth, honour, and distinction ; and, dearer far, wife and children !" And falling on his knees, the blood forsook his lips, and he would have given up the ghost ; but this posture caused his hand to press on the ring given him on commencing his journey, and a spirit stood by his side.

"I am here," it said, "to aid you. I attend on the ring you wear. My power is limited — I can give neither wealth, nor station, nor strength, nor health, — but I can give peace, which is better than all these. Men call me GILEAD."

¹ See Chaps I.—III. 5 L. R. and 6 L. R.

"Ah!" said Pilgrim, "that is all I require. I am tormented in my inmost soul by thick-coming fancies; all men hate and despise me, when I breathe but good-will to all."

And here his life fled for a time, and he fell prostrate on the ground.

That good spirit who had come to his aid, kindly raised him up, and bore him in his arms to a stream hard by, where, by laving his pale face with water, and still more by his cheering words, he restored his soul.

"You have overtaxed your strength, good Pilgrim," said Gilead. "Much labour and an overwrought mind have brought you to this pass. Besides, this deed you have performed has raised your spirit, which has fallen too rapidly again. You have too soon sought other adventures, when rest and quiet should have been yours for a time. You must proceed more gently, and pour out your whole thoughts to me by the way, for I see you have much at your heart."

Here Pilgrim gave a deep sigh, and the tears gushed from his eyes he knew hardly why.

"Alas!" said he, "good spirit, you say truly; my soul would willingly now depart, for I am aweary of my life!"

"See," said Gilead, "there is a shady bower by the road side: let us rest there awhile. Besides, I have that in this flask which has raised many a one in your case."

With that, and leaning on Gilead, and thus nourished, the two sat awhile in this bower, — the bower of PATIENCE, — conversing.

Gilead. — "Ah! dear Pilgrim, I know what is at the bottom of your heart — the love of the praise of man. From this it must be cleansed. In the pursuit of noble actions, you are carried through by other feelings: hope, fear, courage, the love of enterprise, alternately occupy and sustain your soul; but, the deed once performed, you have not enough to fall back upon. You care not, it may be, for station or wealth, but you seek for fame; you desire the breath of men's mouths; you value the praise of the vulgar."

Pilgrim. — "Nay, but, good spirit, am I unreasonable in this? I have adventured my all in the service of mankind.

I ask for no mercenary reward. Am I wrong in hoping I may obtain the good opinion of my fellow men?"

Gilead. — "Most wrong, my friend. Wrong in every way. First, in knowing so little of mankind as to expect their praise. It is enough to differ from the bulk of them to obtain their dislike. Some suspect, some envy, some hate; the greater part cannot and care not to understand you, as having a different pursuit from their own. Thus you become distasteful or unintelligible, and men care not even to see you."

Pilgrim. — "But if I serve them?"

Gilead. — "They will not see it; and if they do, they perhaps hate you worse than ever for it. You are a meddler; you step out of your place; you have done little or nothing good. You have got credit for another's work; nay, you will find it boldly denied that you did the service at all: it was somebody else who did it, or somebody else who told you how to do it. Look for credit for any action, and you will find that means will be found by man to strip you of it, or to make the action odious even to yourself. You think you will get credit for maiming and driving away Feudality, never to return?"

Pilgrim. — "That deed, surely, I may claim."

Gilead. — "Be not too sure of that. You have offended a powerful class; a thousand tongues are at this moment armed against you: your character, your motives must necessarily be assailed and misrepresented; but more than this, you will find it, some time hence, flatly denied that you did the deed at all; and if this be admitted, it will be so qualified as to deprive you of all real merit."

Pilgrim. — "But will not the truth ultimately prevail?"

Gilead. — "Look not for it. Truth is of a penetrating character, and sooner or later forces its way into light; but it often comes at such a time, and in such a fashion, as to be valueless. But further, you are wrong in seeking the praise of man, for when obtained it is valueless. At the time you drink it most deeply, you feel how unsatisfactory is the draught. You find out that a mere accident has given it to you, and that a mere accident may take it away. You dis-

cover that the mass of mankind are carried along by the most paltry feelings, and having drunk the bitterness of popular applause to the dregs, you learn to despise it."

Pilgrim.—"And what, then, must I seek as my reward for my good action?"

Gilead.—"You must be satisfied to have done the good for itself alone. You can look only to this. Carry your wish an inch beyond it, and you will be disappointed. But you are mistaken if you suppose that in this you have no reward worth having. You have the greatest this world affords—a consciousness of having done well. That nobody can take away or even lessen. What matters it what other men think of it? It may injure you to have their praise. Their censure, their hate, their proud looks, their malice, their spite, can only injure themselves."

Pilgrim.—"You have relieved my heart, dear spirit, by your words. I feel myself refreshed and strengthened. Let us proceed to our work."

Gilead.—"One word more. The wise man will turn every thing to his own steadfast purpose. The very slight that he receives, the hateful word or look which meets him, is often a proof of his power. Let him pass it unmoved, nor repay scorn by scorn, and these weapons fall harmless at his feet. He should be encouraged to proceed by them. Let him learn that nothing can really injure him but his own act or his own word. And stay, I will give you an elixir that may be useful to you. If you should ever feel again unnerved, bathe your forehead with this, and it will give you fresh strength. It is THE INDOMITABLE WILL, by which man has obtained all his most important victories."

Pilgrim lost no time in applying this elixir to his forehead and temples, and soon felt his former strength returning.

Gilead.—"Having now nearly passed through this vale, I shall leave you, Pilgrim. My parting advice to you is this:—Trust not in man. Proceed in your course, if it must be, alone; help and strength will be given to you in the hour of need. Work with the tools you have until you can find better, but proceed. Your own enthusiasm will kindle that of others, and in quarters the least expected. Your

own life may be passed in what the world calls poverty and disfavour, but within you will have satisfaction and true joy, and your memory will be embalmed in the minds of men."

With that Gilead disappeared, and Pilgrim emerged from the Valley of Despondency and came into the broad sunshine. And now he entered upon a country which was much favoured by nature, but seemed sadly neglected by man — the country of Madam Equity. The lands were but half cultivated, the hedgerows untrimmed, the gates hanging off their hinges, and the farm-houses in ruins. The only building which seemed to be in a thriving state was a large Asylum for Lunatics, for many of the subjects of Madam Equity found their way into that hapless abode. As Pilgrim proceeded he became aware that he was drawing near the place in which that lady lived, and he soon found that the approach was exceedingly difficult and dangerous; it was, in fact, surrounded by many hindrances and impediments of one sort or the other. Sometimes the traveller seeking Equity found his course impeded by a huge stone, through which he had to cut his way; at others he fell into a pitfall, or was caught in a trap set for him. Thousands attempted to make their way to the Palace but never reached it at all, and were wandering for years in the roads leading to it, starving and desolate, and not a few ended their lives in that Asylum I have already mentioned, to which many of these roads led. Others, disgusted at not having obtained their destination, would willingly have got out again, but, once in, this was found no easy matter, and proved often quite impossible. Women and children were found blocking up these paths in great numbers, and neither age nor sex excited the smallest compassion. The hardest part of the story was, that after their complaints were heard, they were generally handed over to some old and cruel master, who turned a deaf ear to their cries, or mocked their sufferings by habitual postponement.

Pilgrim proceeded on his road with wonder and disgust at all he saw, and no little indignation in his breast. He demanded, as he went, to be brought to the Lady of the Land, but was constantly referred to her officers, who, it was said,

had her authority for all that was done. "But where is Madam Equity herself?" he demanded of all he saw. Sometimes he was shown FIVE solemn persons, of sagacious countenances and amiable demeanour, and was told that they were her representatives, but, on looking closer, he found their hands were all tied. At other times TEN others were pointed out to him, who seemed to be labouring hard in the matter in hand, but the ten had less power than the five, and could often neither move hand nor foot, but were, in fact, only laughed at by those they tried to come at. He found, indeed, that the five called upon the ten for assistance, and the ten invoked the five to aid, and thus it was that, between them, so little was done.

Tired of what appeared to him to be a mockery of justice, Pilgrim again demanded to be shown to the particular abode of Equity herself, but no one at last paid any attention to him. Some were appearing to talk, others appearing to listen; some were hurrying this way, and some were hurrying that way; some seemed very busy all day, but Pilgrim observed that their work was all undone the next. There was a great deal of apparent motion, but no real progress. At times ferocious demons rushed through the crowd, and their faces appeared too familiar to many. PLUNDER, OPPRESSION, and DESPAIR were their names, and they found here a habitation. In all the precincts of this lady's abode, were heard the voices of lamentation and mourning; nay, I grieve to say, that on one part of this land there might be found a pit whitened with the bones of those who had died, seeking in vain that Equity which it had been impossible to find. These were chiefly the friendless poor, for here justice was possible for the rich, but utterly denied to the helpless. "And is this Equity?" said Pilgrim; and as he said this, he passed a small cell, from which he thought he heard issue a moaning sound. On turning to look at it he perceived a small door doubly padlocked. He felt inclined to see what this cell contained, but hardly had he laid his hand on the lock than up started a huge and many-armed giant to oppose him.

"Who is here confined?" said Pilgrim.

"Trouble yourself not as to that," said the giant; "I hold the key, and intend to keep it."

"But I will know," said Pilgrim; "and who is it that disputes my right?"

"One who will maintain it; my name is COSTS."

Pilgrim.—"Ah! have I got thee? I wish no harm to mortal man; but if I have any hatred in me, it is all for thy bloated and unwieldy form."

Now the giant had a massive club, and I saw he made no more words, but rained on Pilgrim a shower of blows.

And here that stout warrior had no little difficulty in standing up against this monster, whose food was man, and who daily consumed many score of the poor and helpless. The ground, indeed, was slippery, and many obscene creatures were seen crawling about and wallowing in the slime of compensation. At last a blow fell on Pilgrim's head, which stunned him and brought him to the ground, nor can I say that he would not now have perished had the giant followed up the blow, but fortunately for Pilgrim he found time to recover, and seizing the giant by the waist, he found that his bulk was all wind and vapour, and thus he squeezed him into nothing, threw him down, trampled on him, and seized the keys of the cell which hung at his girdle. The door once opened, what was his amazement to find in the cell a lady prostrate on the ground, pale, lifeless, and apparently dying.

Pilgrim raised her, and finding that she still breathed, he bore her to the door, allowing the light of the sun to find its way to her. This revived her, and she began slowly to recover her faculties. Pilgrim could not but be struck with her appearance. Her dress showed her to be a priestess; although pale and wan, her countenance bore traces of great beauty, majesty, and sweetness. Pilgrim at last addressed her, and begged to learn who she was and how he could serve her.

"Alas, Sir," she said, "my origin is divine—I am EQUITY; but have been long imprisoned by cruel men, who usurp my authority, and pretend to govern in my name."

"Do I see, then," said Pilgrim, "that being whom I desire?"

Arise, Madam, and show yourself to the thousands of devoted persons who are seeking your countenance, and to whom your presence will impart infinite joy."

And here leading forth that gracious and lovely lady, invigorated by the clear air of the morning and the joy of her deliverance, Pilgrim presented her to the thousands of suitors for her favour, who catching almost by inspiration the thought that she was at last visible whom they sought, accompanied her with acclamation to that Palace where others reigned in her stead, who thus displaced, were then taught a lesson which they never forgot.

ART. VIII. — REVISION OF PUBLIC BILLS.

STEP by step we proceed. That which was considered mere talk when first proposed, shapes itself into substance. The enthusiast of this year becomes the practical man of the next. That which was pronounced impossible¹ is simply accomplished. Thus it is that we again bring before our readers, with much more hopefulness, the subject of Revision of Public Bills, which we first² proposed, with some fear and trembling. We think it will be easy to show that some consideration of this subject cannot be much longer delayed.

We shall, on the present occasion, fortify our own opinion by that of some learned persons who have given evidence on the point very recently before two Committees of the House of Commons, — the Committee on Private Business (1846), and the Legal Educational Committee of the same year. It will be obvious that in neither of these committees were

¹ We commend some lines of a poet, rather gone by, to our law reformers: —

“ The wise and active conquer difficulties
By daring to attempt them; sloth and folly
Shiver and shrink at sight of toil and hazard,
And make th' impossibility they fear.”

² See No. I. p. 134.

public bills the direct subject of inquiry; but truth will out; and it is evident that the ideas both of the members of these committees and of the witnesses ran in this channel, perhaps in spite of themselves. Besides, it is well known that if any one has now a great truth struggling in his breast, he straightway departs to the first committee of either House that he can get at, and is delivered of it. It is found that a committee is now the only legitimate midwife of such offspring—far better than a pamphlet, and only inferior to an article in our *REVIEW*. In the unfathomed caves of the Blue Book the pearl must remain until some noble or honourable, but adventurous diver, brings it into light, and probably adopts it for his own. Then begins its real life. The idea is thus divulged; it attracts some attention; it is flatly denied by many sagacious men that it is a truth at all; it is impracticable—absurd: it is true, nevertheless, and gradually wins favour; the sagacious men begin to doubt, and one by one give in their adherence.

We shall now show the present state of this subject by mentioning some of the opinions to which we have alluded.

Let us first give that of Lord Brougham, who has lost no opportunity of stating the necessity for some alteration of this kind:—

3791. “Would you say that the arrangement and phraseology of Acts of Parliament also required as much amendment as the mode of conducting the public and private business?”—Lord Brougham: “Yes; I think the phraseology of Acts of Parliament might be very greatly improved; they might be made much shorter, and repetitions might be much more avoided than they now are. The rule might be adopted, the most useful of all rules in drawing Acts of Parliament, and, indeed, in drawing every instrument, of never using the same word in different senses, and of always using the same word when you mean the same thing. Besides, great mechanical convenience might be obtained from doing away with that established notion that an Act of Parliament is all one sentence, and by dividing it into sections, and allowing reference to be made to the different sections, and also by allowing one act to refer to a portion of another act, by the words and letters with which the part of the clause commences, and with which it closes; at present the reference is perfectly general; it is

only that it was so enacted by an act passed in such a year of such a reign, without even mentioning the chapter, only giving you the title of the act; but, although you refer to the chapter, yet you may be referring to an act which has 200 clauses, and you have no means now of stating to which of the clauses you refer.”—
L. E. COMMITTEE.

Let us next give the opinion of Mr. Bethell: —

759. “ Acts of Parliament abound, in many cases, not only with technical errors, but errors in matter, arising principally from the ignorance which you have just referred to?”—“ The present system, allowing any member of parliament to bring in a bill composed by himself in his own language, without check or control, is, I think, a very great error; and the system of manufacturing a bill in committee by details, and by a piece-meal operation, is a process which, having regard to the fact that there is no authority or mind to which the patchwork composition may be subsequently submitted, is, to my mind, one of the fertile sources of errors and contradictions, and, if one may speak so with respect, absurdities in Acts of Parliament.”

762. “ You would also be of opinion, that even the generality of lawyers are not capable of framing an Act of Parliament in the proper form; would it not therefore be advisable that conveyancers should be appointed for both Houses of Parliament, in order that Acts of Parliament might be framed by two or more persons who are legally competent to understand the provisions of the bill with respect to itself, more so than with respect to other statutes?”—“ I think proper officers should be appointed, to whom every bill, previous to its first reading, should be submitted, and who should be required expressly to accompany the draft of the bill with a short report or certificate to the House of the existing law upon any subject which the bill proposes to deal with, and of the particular manner in which the bill purports to affect that existing law, and also who should be answerable for the phraseology of the bill previously to its being read a first time before the House; and I think that the bill should be restored to the supervision of the same tribunal after it has passed through the Committee, and previously to its third reading.”

764. “ What are the errors which may be attributed at present in the drawing up of Acts of Parliament, even to the most skillful conveyancers?”—“ I think one error (if I may presume to say so) which I have observed has been, a laborious attempt to enu-

merate every particular case, and to provide for every possible detail, instead of using general language of comprehensive import, and which would render unnecessary the particular enumeration; and whilst it abridged Acts of Parliament by one half, would render them more easily comprehended at the time they are drawing, and much more easily interpreted when they have to be applied in practice."

Mr. Rushton, the stipendiary magistrate of Liverpool, speaking, as we apprehend, both of public and private bills, says—

"The bill is frequently prepared by a draftsman in the country, who may have never drawn a bill upon that subject before, and who is guided simply by precedents. If you were to have recognised and responsible draftsmen, you would make a step in advance in clearness and consistency of language, and you would bring the enactments within the understanding of those by whom they are expected to be obeyed, whether understood or not."

333. "You have stated that you thought that every bill should, before it is introduced, be submitted to some responsible department; you think there should also be some individual appointed, either by the Speaker, or otherwise, under whose directions every bill should be drawn, in order to secure uniformity and accuracy in the enactments?"—"Yes; that the preparation of a bill or a petition, setting forth fully the facts, should be by a known and a responsible, instead of an irresponsible draftsman. Speaking of the wording of bills, the Committee may remember an instance where an act, giving the power to institute a lottery, after the state had forbidden lotteries, was passed by the cleverness of the draftsman omitting the word "lottery."

We shall next give the opinion of a gentleman of great experience on the matter, Mr. Drinkwater Bethune, who has for many years held the situation of drawer of government bills, and who is now a member of the Legislative Council of Bengal:—

658. Sir G. Grey (speaking chiefly of private bills). "Would you refer a bill, after it comes out of committee with amendments made, which, probably, would not be uniform, being made by different committees, to the same staff?"—Mr. Bethune: "That would be a difficulty; that difficulty is felt in public acts as well

as in private acts. A bill frequently comes out of committee with amendments made, the tenor of which is completely at variance with the intention of the act."

659. "Is there any mode of securing that uniformity in the acts as ultimately passed?"—"A practice has lately grown up in public bills, which has been found very convenient; instead of making an amendment on the spot when suggested, the principle of it has been admitted, and the party having charge of the bill has undertaken, that an amendment, carrying out the spirit of that resolution or vote, or whatever it may be, shall be ready at a subsequent stage of the bill; that partially remedies the evil complained of, but not altogether."

Then follow some questions chiefly as to local and private bills, but they are also important on the subject of public bills:—

660. "Might not the same course be taken with private and local bills?"—"Perhaps it might. In the case of a private bill it would be done at a subsequent sitting of the committee; the proposition for an amendment being made in general terms, and the terms of it being settled between the contending parties; it then would be referred to the draftsman having charge of the bill to incorporate the amendment in the bill, and to re-produce the bill at a subsequent sitting of the committee in the amended form.

661. Mr. Greene: "You are presuming now that there is to be a general draftsman appointed by the House?"—"A staff of draftsmen."

In Ireland the want of some board of this kind seems to be very much felt:—

3146. Chairman: "Do you think that Acts of Parliament, as they have been frequently drawn up, are too complicated in their phraseology and arrangement?"—Mr. Longfield Q. C. (of the Irish Bar): "I think so. That has been partly caused by the rigid system of interpretation adopted by the judges. If they can find a flaw in the act, they will."

But it seems useless to multiply opinions of this nature, when all agree as to the evil, and almost all on the remedy. We will only add the following statement of Mr. John Stuart, M. P. for Newark, made in the House of Commons on July 8. 1847. He said—

"As a lawyer, he never felt his profession so degraded as when he found, that from words improperly introduced into a bill private rights were invaded, and questions were raised by the ingenuity of lawyers, who were stimulated to put a different construction on words, which ought never to have become a matter of doubt. He contended it was indispensably necessary to simplify the construction of Acts of Parliament. If we would refrain from holding out baits to the litigious part of the community, we must trust more to the good sense and discretion of the courts, magistrates and individuals, and we must legislate in larger and more general terms."—*Hansard*, vol. xciv. p. 28.

The following passage in the last number of the *Edinburgh Review* (in which, we think, we perceive the proper appreciation of the necessities of the age as to the reform of the law) induces us to suppose that the subject may be now under the consideration of the Government:—

"In the present multitude of legislative measures, it would be desirable that bills should, as far as possible, be in the hands of a responsible department of the Government, and not carried through by private members, even if private members were, in the press of business, always able to succeed in the attempt.... We fully agree in the importance of arming the executive government with ample means for the careful preparation and mature consideration of legislative measures before their introduction into Parliament. This is a subject which deserves more than a mere cursory allusion; and we will therefore now only remark, that the practical skill for which this country is renowned has not hitherto shown itself in the form or mode of its legislation, the state of which has now become not only a great difficulty in the ordinary administration of the law, but a serious impediment to its amendment and reform. An improved organisation for preparing bills for parliament, and for regulating the introduction of alterations during their progress through both Houses, is quite compatible with the supremacy of the Queen's ministers over all the legislative propositions of the Government, as well as with the entire freedom of parliamentary discussion."—*Ed. Rev.* for Jan., p. 154.

Since writing the above, we understand that the Government have had under consideration several plans, more or less

detailed, and that the question lies between three systems—the *isolated*, or that under which the law advisers of the different departments act without plan and without concert with each other; the *single or united system*, under which all the work is to be done by one man, with assistants, or by a board consisting of several members; and the *combined system*, under which all the agents will be brought together under the presidency of one of their number, or of a Board.

The *isolated* system is that which has obtained in times past, and under which the absurdities and defects of our statute law have thriven so luxuriantly.

The partial attempt to adopt the *united system* under Mr. Drinkwater Bethune, during the last ten or twelve years, has failed through want of subordinate aids; and it is conceived that, with the amplest assistance, it would be beyond the capacity of one man fully to comprehend the exigencies of all branches of the public service, and of all branches of law.¹

We understand that to meet all the difficulties of the case, a detailed plan of a *combined system* has been before the Government.

It has been proposed that the Government should, according to its present practice, avail itself of the services of the law advisers of the departments, and also of other gentlemen conversant with particular matters, or particular branches of the law; that by the operation of indexes, the provisions of the different bills should be compared, and that the discrepancies which may thus be discovered should be referred to a Board, which should have cognisance, not of matter of policy, but of matters of law, and principally of technical matters; that the whole should be under the superintendence and auspices of a Committee of Privy Council, consisting of the ministers and other members of the Government, being members of Parliament and lawyers, to whom all matters of policy should be referred.

It is proposed also that the printers, index-makers, and copiers, who are now indirectly employed in great numbers, should, to a certain extent, be so organised as to enable them to afford more assistance in the details, and thus relieve the draftsmen of much needless drudgery.

Into these and other subordinate matters, which form part of the plan, we do not propose to enter; we consider that the question to be determined at present is one of principle: *whether the Legislature, which is one, should have an undisciplined horde of law-writers to express its will; or, that there should be so much plan and concert as will enable the numbers employed to speak, as one man, the will of the one body,—the National Legislature,—and that in such uniform style, that the people, officials, and the judicatures may, with more ease and certainty, collect its intention.*

It may fairly be considered, too, whether the proposed contrivance of a Committee of Privy Council to enlist a part of state machinery in pressing these matters in Parliament, may not, and ought not, to be strengthened by Standing Law Committees in both Houses of Parliament. It would furnish some probability of subduing the mass of grievances recorded in Blue Books, which annually augment the opprobrium of Parliament, and diminish the possibility of lessening the national sufferings.

We know that the common notion among public men is, that the people feel no interest in these things; which is true after a sort; just as a man who suffers from the gout, takes little thought of his sufferings when the fit is not upon him, but when it is, feels mightily interested in obtaining relief, and not indisposed to hug the benefactor who affords it.

The truth is, we all feel interest in the results, not in the means—in the facility of travelling, not in the details of the construction of coaches or railways; and we humbly take leave to suggest to Government, that it is not less necessary to guard against ministerial defeats and national disappointments, resulting from inglorious failures in legislative measures, than it is to take thought of the chances of war, and to provide for its occurrence, which, by the way, may be not a little promoted by the weakening of the authority and power of the Government by means of these, as well as by means of disgraces of other kinds.

It has been our fate to be not only a spectator of, but an assistant in measures, and to track the causes of failure—to trace the fracture or imperfection of the rail by which the

speed of the carriage has been impeded, and the train overturned; and, moreover, we know that every ministry does its work three times over, and compels Parliament to fare as ill, because it denies to itself facilities which are within reach.

A morning's investigation by a Committee of the Government—a night's recollection of debate in Parliament about the turn of a phrase or the meaning of a word—a glance at the differences of the measures even now under consideration; and a thought about the difficulty and even the inability to explain what is set down for them, would dispose of the question, whether something should be done or not; and that that something should not be the past system, the statutes at large abundantly testify.

We cannot but hope that another year will not be allowed to pass away without a business-like attempt to deal with an evil which all recognise—and that the fair purposes of the Government will not be allowed to be defeated by the misapplication of means.

A great architect does not work out the details which his genius has fashioned; if he attempted it he would find himself able to do even less than his workman: so it is frequently with public men—they make sad draftsmen; and in despising the craft they repudiate the only means by which their wisdom can be effectuated.

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ART. IX.—REPORTS OF THE SOCIETY FOR PROMOTING THE AMENDMENT OF THE LAW.

COMMITTEE ON EQUITY.

THE following reference was made to this Committee:—

“To consider the expediency of relieving the suitor from the expense of the judicial establishment, and of placing the burthen on the general revenues of the country.”¹

¹ As the whole fee-system is now before a Committee of the House of Commons, we print this report of the Equity Committee and the accompanying

THIS question has been referred to all the Committees of the Society; and it is conceived that the answer from all the other Committees must be to the effect, that the State should be at the expense of all the judicial establishments to which these Committees peculiarly relate; but in Courts of Equity, where the proceedings are not merely judicial, but mixed, that is, partly judicial and partly administrative, a difference of opinion may arise, whether the expense attendant upon those suits which are purely administrative, or those parts of suits which are purely administrative, should not be borne by the estate to be administered, or the parties interested therein, rather than the State. There is no difference of opinion in this Committee, that the expenses of these establishments, so far as they may be considered purely judicial, should be borne by the State. It appears, however, that part of these judicial establishments, such as the Lord Chancellor, two of the Vice-Chancellors, as to their respective officers, and the expenses attendant upon their respective Courts, and the Examiners in part, are paid out of the Suitors' Fund; that the Masters, whose duties are partly judicial and partly administrative, are also paid out of the Suitors' Fund; that the Masters' clerks are paid out of the Fee Fund; that the Taxing Masters, whose duties are partly judicial and partly administrative, are paid out of the Fee Fund; that the Registrars, whose duties are partly judicial and partly administrative, and their clerks and other officers, are paid out of the Fee Fund; the Master of Reports and Entries and clerks are paid out of the Fee Fund; that the Examiners in part and their clerks are paid out of the Fee Fund; that the Clerk of Affidavits is paid out of the Fee Fund; that the officers of the several Courts are paid out of the Fee Fund; that the expenses of the Lunacy Commissioners and their officers and office are paid out of the Fee Fund; and that the compensations given to the lately abolished Six Clerks are also paid out of the Fee Fund. The whole expense of the

Paper, as likely to give some information on this subject. These were read on the 5th of Feb. 1845. The Report was drawn up by the late master Lynch, and the Paper by another member of the Committee.

Court of Chancery, in the year ending the 1st of Oct. 1843, amounted to 233,936*l.* 6*s.* 10*d.*, of which 13,000*l.* only, viz., the salaries of the Master of the Rolls and Vice-Chancellor, are paid by the State. 74,170*l.* 13*s.* 10*d.* is contributed by the Suitors' Fund, and the remainder is obtained by fees taken from suitors.

The following are the particulars: —

	£	s.	d.
The lord chancellor - - - - -	10,000	0	0
Vice-chancellors Bruce and Wigram - - - - -	10,000	0	0
The masters - - - - -	29,612	10	0
The accountant-general and his official expenses - - - - -	9,128	4	1
The examiner - - - - -	900	0	0
Clerk of affidavits and clerk in report office - - - - -	600	0	0
Officers of the lord chancellor and vice-chancellor - - - - -	2,777	17	4
Solicitor to the suitors - - - - -	700	7	8
Compensations to officers of the Court of Exchequer - - - - -	6,474	15	0
Expenses of courts, &c. - - - - -	3,813	11	6
Sundries - - - - -	163	8	3
Total - - - - -	74,170	13	10

There were, also, paid out of the Suitors' Fee Fund, from the 25th November, 1842, to the 24th of November, 1843, the following sums: —

	£	s.	d.
Compensations and salaries of masters' clerks, &c. - - - - -	16,267	5	1
Registrars and clerks - - - - -	27,173	0	0
Master of reports and entries and clerks - - - - -	6,350	0	0
Examiners and clerks - - - - -	2,300	0	0
Clerk of affidavits - - - - -	795	0	0
Commissioners of lunacy, clerks, &c. - - - - -	11,138	13	0
Taxing masters, &c. - - - - -	32,231	18	10
Compensation to six clerks, sworn clerks, clerks, &c. - - - - -	46,509	16	1
Total - - - - -	142,765	13	0
Add charge on suitors' fund - - - - -	74,170	13	10
Total - - - - -	£216,936	6	10

Besides these sums, there are paid to the Lord Chancellor, out of the Consolidated Fund, a further sum of 4000*l.*, by virtue of the Ordinary Sessional Appropriation Act; to the Master of the Rolls, out of the same fund, a salary of 7000*l.*, by virtue of 7 W. 4. and 1 Vict. c. 46. s. 2.; and to the Vice-Chancellor of England, out of the same fund, a salary of 6000*l.* per annum, by virtue of 53 Geo. 3. c. 24.

The first question is, how this state of things is reconcilable with the admission that all that part of the establishment which is purely judicial should be borne by the State?

The second question is, whether that which is purely judicial can be distinguished in practice from that which is purely administrative?

And the third question is, whether the establishment, so far as it is occupied by suits purely administrative (supposing the distinction to be made), should be supported by the State, or by the estate to be protected and distributed, that is, by fees paid out of such estates, or by the parties interested in such estate?

It is quite clear with respect to the first, that the admission before referred to is not reconcilable with the facts, and that, as the whole establishment is not supported by the State, a distinction should be made, if possible, between that which is purely judicial from that which is purely administrative. It also deserves inquiry, how it is that the Master of the Rolls and the Vice-Chancellor of England are paid out of the general revenues of the country as all the other Judges of the other Superior Courts, and that the Lord Chancellor and the other two Vice-Chancellors are paid out of the Suitors' Fund.

And this leads to the next question — Can this distinction be made?

In respect of those suits purely administrative, the Courts have to determine, in the first instance, Whether the necessary parties are brought before them? — Who are the next of kin? — Who is the heir at law? All these are judicial matters, and not merely purely administrative. How often is a will to be construed; how often are assets to be marshalled; how often the real and personal estate to be distinguished; how often is the purely personal estate to be separated from that which may savour of the realty. How often do all these questions arise before the Masters as well as before the Judges; and, in addition, how often has the Master to decide upon the validity of a debt, the consideration given, whether it is tainted with usury, and therefore to determine what constitutes usury — whether a debt is barred by the Statute

of Limitations — all these are judicial questions, and not merely administrative. How often does it arise that a suit, which may at its commencement be considered merely purely administrative and amicable, turn out to be contentious and severely fought ; the result is the distinction cannot be made. This, in the opinion of this Committee, disposes of the question ; but it is thought advisable to refer to the third point also, whether suits purely administrative should contribute by fees to the support of the establishment of the Court of Chancery.

There is a difference of opinion in the Committee, but that of the majority is, that suitors of no description should contribute by fees to the support of the establishments. It is considered that the State is as much bound in the case of minors, and in the case of persons of unsound mind, and in the case of creditors, to uphold establishments for the protection and distribution of estates, as to uphold establishments for suits purely contentious. The social compact is, that protection be given to the life and property of each individual. Now unless, upon the death of each individual, and until there is a legal and competent hand to receive it, the property of the deceased individual be protected, the social compact is not fulfilled. It may be said that each individual may appoint his representative, and if he does not, the State does for him ; but if such representative neglects his duty, or if he disclaims, how is the property to be protected but by the Court ? Again, the representative is unwilling or unable to distribute the property on account of the difficulties of construction, or the parties interested are not satisfied with his distribution — on whom does the distribution fall ? On the Court. It is, in fact, protection of the property, and in case of parties being dissatisfied with the distribution of the representative, the suit must be considered contentious. It must be borne in mind that each individual member of society may die possessed of property, and dying so possessed, he must have successors, and such successors may be minors, and that minors, according to the laws of England, are under the protection of the Queen, that is, of the State.

Again, an individual may die indebted; upon his decease the necessity for protection arises, as we have already seen; but in the case of creditors the case is stronger, inasmuch as it is not for the successors of individuals the property is to be secured, but for other individuals of society. Again, for the sake of quiet and the sake of justice, a certain distribution is directed by the law. Is there any thing unreasonable in saying that the protection which the State is bound to give, and the distribution which it directs, should be borne by the State? Why is a standing army upheld in a state of peace? Is it not for the protection of property and life? although each individual may not stand in need of such protection, but all and each may require such protection: and so it is with the case of deceased individuals; the property of each may not be in danger, but the property of each individual, on the other hand, may be in danger of being lost, which loss the State is bound to prevent. It is not, therefore, more unreasonable to pay the expense attendant upon the protection and distribution of the deceased individual's estates, than it is to pay the expense of a standing army during peace. Not only is each individual liable to die in debt and possessed of some property, but each individual is liable to be a creditor.

For these reasons this Committee is of opinion that all fees should be abolished, and that parties should merely pay for copies and at stationers' prices.

There is one heavy charge upon the Suitors' Fund and Fee Fund, that requires particular attention, and that is the case of compensations. If offices are useless, and on that account to be abolished, or if charges are made which by length of usage are to a certain degree sanctioned, and it is right to abolish such charges, surely the State which allowed such charges to be made for so long a time, or allowed the creation or existence of such useless office, should bear the compensation generally given upon such occasions; but instead thereof, the compensations given on the abolition of the Court of Exchequer are charged on the Suitors' Fund, and the compensation given on the abolition of the Six Clerks' Office are made charges upon the Fee Fund, and not only

this, but a severe and heavy set of fees are imposed in order to meet such charge. The copies in the Masters' Office, instead of being $1\frac{1}{2}d.$ per folio, are raised to $4d.$, $2\frac{1}{2}d.$ of which goes to the Fee Fund; 4*l.* per cent. is imposed upon all bills of costs upon taxation.¹ This, in the case of an insolvent estate, is most cruel, and it is the opinion of this Committee that all compensations should be borne by the State. So it should be in respect of superannuation. An officer grows old in the service of the public. It is fit he should retire. Who should pay his retiring salary but the State?

This Committee must also notice the expense attendant upon the Commissioners of Lunacy and their officers, which is thrown upon the general Fee Fund. This appears to this Committee most unjust. The expense attendant upon the distribution of the property amongst the creditors of the lunatic, and also the protection of the property down to the period hereafter mentioned, should, as in the case of deceased persons, be borne by the State, but as soon as the clear residue is ascertained, each estate should pay the expense attendant upon its management and future protection, and the issuing the commission in the first instance, and expenses attendant upon it, should also be borne by the particular estate.

This Committee are further of opinion, that the 10,000*l.* a year now payable to the Lord Chancellor, and 5000*l.* a year payable to two of the Vice-Chancellors, and the salaries of the registrars, and the expenses of the registrars' office (being the officers of the Judges) and the whole salaries of the examiners, who are solely employed on matters merely judicial, and the salaries of their officers, and the expenses of their office, should be borne by the State. That all compensations and superannuations should in like manner be borne by the State. That the salaries of the masters and their clerks, and of the taxing masters and their clerks, and of their offices (the matters transacted before them being partly judicial and partly administrative,) should in the first instance be thrown upon the Suitors' Fund, and the residue should be borne by the State.

This Committee think the income arising from the Suitors'

¹ This has since been reduced. — Ed.

Fund may be so applied. It is, in fact, the property of the State. It is the general average of deposits, which may be set aside after providing for the necessary and daily calls and payments: the State being in this respect the general banker of the nation, makes so much profit, which may be applied in lessening the burthen, which in the opinion of this Committee otherwise ought to be borne by the State itself; but if all this cannot be accomplished, this Committee trusts the salaries of the Lord Chancellor, of the two Vice-Chancellors, of the examiners, and the registrars and of their respective officers, and the expenses attendant on the respective courts and offices; and also the charges for compensation and superannuation, will be made charges upon the general revenues of the kingdom.

[The following paper by one of the members of the Committee on the presentation of the report.]

It appears by the return to Parliament made by the Accountant-General of the Court of Chancery, that the following sums were paid out of the Suitors' Fund, between the 2d of Oct. 1842, and the 1st of Oct. 1843.

	£	s.	d.
To the lord chancellor - - - -	10,000	0	0
Vice-chancellors Bruce and Wigram - - -	10,000	0	0
The masters - - - -	29,612	10	0
The accountant-general and his official expenses -	9,128	4	1
The examiner - - - -	900	0	0
Clerk of affidavits and clerk in report office -	600	0	0
Officers of the lord chancellor and vice-chancellor -	2,777	17	4
Solicitor to the suitors - - - -	700	7	8
Compensations to officers of the Court of Exchequer -	6,474	15	0
Expenses of courts, &c. - - - -	3,813	11	6
Sundries - - - -	163	8	3
Total - - - -	74,170	13	10

There were also paid out of the Suitors' Fee Fund, from the 25th of Nov. 1842 to 24th of Nov. 1843, the following sums: —

	£	s.	d.
To compensations and salaries of masters' clerks, &c. -	16,267	5	1
Registrars and clerks -	27,178	0	0
Master of reports, and entries and clerks -	6,350	0	0
Examiners and clerks -	2,900	0	0
Clerks of affidavits -	795	0	0
Commissioners of lunacy, clerks, &c. -	11,138	13	0
Taxing masters, &c. -	32,281	18	10
Compensation to six clerks, sworn clerks, clerks, &c. -	46,509	16	1
Total -	142,765	13	0
Add charge on suitors' fund -	74,170	13	10
Total -	£216,936	6	10

Besides these sums, there are paid to the Lord Chancellor, out of the Consolidated Fund, a further sum of 4000*l.* as Speaker of the House of Lords, by virtue of the usual Sessional Appropriation Act.

To the Master of the Rolls, out of the same fund, a salary of 7000*l.* by virtue of the 7 W. 4. and 1 Vict. c. 46. s. 2., and to the Vice-Chancellor of England, out of the same fund, a salary of 6000*l.* per annum. Thus, it appears that the whole judicial establishment of the Court of Chancery costs the sum of 233,936*l.* 6*s.* 10*d.*, of which only 13,000*l.* is paid out of the general revenues of the country.

It will be seen, however, by the above statement, that besides the Judges, a large staff of officers is rendered necessary in Chancery, inasmuch as the duties of this Court are in many suits almost wholly, and in nearly all suits partly administrative. It is the general policy and practice of this Court, in most cases, to take possession of the property involved in any suit before it; and where parties are under disability, the Court of Chancery steps in, and, on being required so to do, receives the property of such persons, and administers it according to certain fixed rules. In many other cases, public companies and other public bodies resort to the Court of Chancery, as the depositary for the sums of parties selling or disposing of their rights, and having limited estates, and for other purposes.

It is the first duty of a state to protect its subjects from fraud; and whether the fraud is violent or otherwise, should

make no difference in principle; nor can it make any difference whether the fraud is connected with matters of account, or any other branch of fraud. Fraud is merely taken on the present occasion as one obvious instance of equitable jurisdiction; but where there is a clear claim for equitable relief, then it is the duty of the State to furnish the suitor with the judicial power to relieve it. It is conceived, however, that there are a great many suits in the Court of Chancery which do not ask for peculiar equitable relief. In many cases the Court of Chancery simply acts as the steward of the estate; as the banker and receiver of the party; as the machine for keeping safely and distributing justly the property of individuals who in many cases voluntarily resort to it. It is not necessary to say that the State should not render them this assistance; all that is attempted to be proved is, that where the suit is strictly contentious in its character; where fraud is alleged to have been committed; where doubtful rights are to be declared; or where obscure wills are to be construed, and a reference to the Court is absolutely necessary, parties obliged to resort to it, or dragged before it, are entitled to a prior claim to be relieved from the expense of the Judge and the judicial establishment. It is quite true that it may be difficult, and it is said to be impracticable to determine what are administrative suits and what are not; all suits, it is admitted, may at any time assume a contentious character. On the other hand, it will not be denied that many suits and matters exist and are carried through the Court of Chancery which, if not purely administrative throughout, are so in the greater part of their proceedings, and that a very large sum is annually paid out of the Court of Chancery arising from such suits.

Let it not be supposed that this distinction attempted to be drawn is of a speculative character — it is of great practical importance. It is on the contentious suits that the great bulk of the fees now paid in the Court of Chancery falls; and this is peculiarly hard where the property involved is inconsiderable. If it be possible, therefore, to relieve this class of suitors from these fees, and to place them on the suits of proceedings which relate to the property which is now advan-

tageously managed by the Court, a great benefit would be rendered to that class of suitors which it is contended have the greatest right to relief.

Some authority for this distinction may be found in the Report of the Chancery Commissioners made in 1826. Referring to the expense of the Masters' office in Chancery, the Commissioners state, "that there was no doubt the suitor would be materially relieved if the whole fees then payable in the Masters' office were discontinued, and the Masters were in future paid entirely by salary; but the Commissioners had no hesitation in rejecting that suggestion as unjust to the public. A great part of the Masters' duty," they continue, "consists in superintending the administration of private property, and in other matters of a more personal nature, and which concern the individuals before him much more exclusively than those which fall under the cognisance of the Judges. The charge, therefore, of these officers is not unfairly laid upon the suitor; and in whatever manner it might be thought fit that the remuneration should be received, the Commissioners are of opinion that the fund out of which it was to be paid should continue to be provided, in part at least, by fees payable on the proceedings." (*Chan. Rep.* p. 23.)

It may also be observed that in the Report of the Select Committee of the House of Commons in 1833 the following opinion was expressed:—

"Your Committee are also of opinion that the salaries of the Masters in Chancery may and ought to be paid out of the funds of the Accountant-General, known by the name of the Sinking Fund, and that the salaries of the other officers ought to be paid out of a fund to be raised by fees to be hereafter received in the several offices created and continued as hereinafter mentioned."

It would be in conformity with these opinions, it is conceived, if administration suits of the character alluded to were still made to pay these fees; and suits of a purely judicial character were relieved from them.

It must also be borne in mind that the distinction here attempted to be established would give a much more prac-

tical character to any report or recommendation which this Committee might make as to it. It seems hopeless to attempt to relieve the suitor from the whole of the great burthen already enumerated now borne by him; but if this distinction was carried out, this burthen might be so adjusted as to fall on the suitor most able and most entitled to bear it, instead of pressing, as it now does, on those least entitled to, and generally least capable of, bearing it; and in furtherance of this object, the public at large might reasonably, and with a well-founded probability of success, be asked to assist, by placing on the general revenues of the country the whole of the salaries of the superior Judges, being only about 20,000*l.* in addition to the amount now placed on those revenues.

It becomes then of great importance to consider whether it is wholly impracticable to make the proper distinction. A great many suits and matters in Chancery, in all or most of their stages, are called by the name of "consent causes and petitions." There are many suits in which only one or two points are involved, and which alone are argued; all other proceedings in the cause being merely consequential. Does not a large proportion of these last-mentioned matters and suits fairly come under the denomination of administrative suits? If this be so, where would be the hardship or impossibility of fixing some *ad valorem* fee on the funds so administered in these suits; and might not this be left to the direction of the taxing-masters, under certain regulations. There need be no difficulty in ascertaining which suits were administrative and which contentious, if fees were levied on all suits in their administrative stages, and were taken off in their contentious stages; reversing, in a great degree, the present rules in this respect.

It is to be remembered that in the purely judicial or contentious suits, the burthen of the suitor for professional assistance is usually much heavier than in the administrative suits, and that ordinarily he can much less afford to bear it; and in these suits it is that questions are usually decided, and rules relating to property defined, which are of importance to the whole community.

It may also be fairly assumed that the sums paid out of the Court of Chancery, in the performance of its administrative or ministerial functions, amount to a very large sum, probably many hundreds of thousands in the course of every year. If, then, a small percentage were laid on these sums, the present burthen pressing on the suitor most entitled to consideration might be materially alleviated.

For these reasons, I feel compelled, most respectfully, to differ from that part of the Report of this Committee which considers that the State is bound to provide the expenses of the judicial establishment in all suits alike; and I submit that the scale of present fees should be remodelled with reference to the distinction I have adverted to in the preceding observations.

COMMITTEE ON THE LAW OF PROPERTY.

PART I. — FIXTURES.

THE following reference was made to this Committee:—

“To consider the propriety of amending the law of landlord and tenant, with respect to fixtures and permanent improvements.”

As your committee have, in revising their report on this subject, received many valuable suggestions, and made several important additions, they have considered it advisable to adopt the course proposed at the last general meeting, of dividing their report into two parts — a course to which the distinction between the characters of the two branches of the subject obviously leads. The first part, which they now present to the society, contains the discussion of the general principle on which the law in question ought to be based, and its application to the subject of fixtures; the second part, which they hope to present at the next general meeting, will relate to permanent agricultural improvements of the soil.

The question referred to your committee involves a consideration of the old and firmly established principle, that "everything once attached to or embodied in land belongs to the person entitled to the land in the same manner as the land itself." It is hardly necessary to mention that it is on this principle that the whole law of waste is founded. Your committee propose, therefore, to discuss this principle, to look to the circumstances under which it was adopted, to consider whether present circumstances are not so changed as materially to affect its justice and expediency; and then to ascertain whether it is possible without great inconvenience to make any and what alterations in the existing law by way of remedy.

The rule that persons entitled to limited interests in land shall not take from it anything which has once been fixed to or united with it, was not carried to a very great extent by the common law, but owes its chief importance to the statutes concerning waste passed as early as the reigns of Henry III. and Edward I. At those periods the views commonly held concerning property in land, and the relation between landlord or reversioner and tenant, were very different from those which now prevail: and we may fairly attribute the extensive application of the rule in question, and the severity with which it was enforced, to the very slight importance then attached to the tenant's limited interest as compared with the landlord's freehold; to the small value of any improvement or annexation which the tenant could make; and to the fact that laws were made by the landlord only. Above all, the landlord and tenant were not looked on simply as parties to a contract concerning property in which the rent on the one hand and the usufruct of the land on the other formed the only terms. They had personal relations which placed the landlord in the condition of a superior, the tenant in that of a dependant, and prevented the notion of a contract (which is founded on equality) from being fully developed. It is hardly necessary to point out how completely the state of things is altered. In point of value and of perfection of title, chattel interests now differ from freeholds only in duration: the ownership of the free-

hold gives no advantages, unless accompanied by superior wealth¹; the landlord brings the temporary usufruct of his land into the market, just in the same manner as the merchant brings his wares; and the only advantage he has, viz. that of possessing a commodity of which there is a limited supply, is one strictly commercial. The relation of landlord and tenant is really the same as that of two parties to a contract concerning a chattel, one of whom bargains for the use of the chattel for a given time, the other for a pecuniary return. What then ought the rights of the lender to be at the end of this time? In what state, according to principles of natural justice, ought the borrower to be obliged to restore the thing lent? In no worse state, certainly, than that in which he received it: but more cannot be required of him: he must return it undiminished in value: but nothing short of express contract should oblige him to restore it with any additions, except such as are due to the natural and progressive improvement of land under a course of fair ordinary management, and not to any special exertion or outlay on his part.

If, therefore, the tenant has during his tenancy made any addition to the land, he ought at the end of his tenancy to have the right of appropriating such addition for his own benefit. How this right may be exercised, and how far its exercise may be limited by the nature of the addition, are considered below.

The injustice of the rule in question as applied to the present state of things is therefore obvious; its inexpediency is no less so. The law, as we shall see, has long admitted this, so far as concerns trade; and it is equally true with respect to agriculture. Of all things which can be lent or borrowed there is none so capable of permanent improvement as land, none so rapidly rising in value, none for the produce of which there is so great and so increasing a demand. The application of science to this improvement, steady progress under its guidance in the art of agriculture, and of preparing the

¹ It is true that there is some difference as regards political franchise; but as this does not affect the relation of landlord and tenant, it is of no consequence in the present discussion.

produce of the soil for market, are matters of yesterday; and yet there are few arts which hold out, even now, so large promises of success. But experience is wanted; experiments tried on a large scale in different situations, soils, and climates, not by amateurs only, but by men who practise farming as a trade, and who, depending on it for a livelihood, are required to make it answer. By far the greater part of these experiments are attached to, or in some manner affect, the soil and freehold; they consist of machinery and buildings annexed to the land, or of drainage, manures, and other such improvements incorporated with it. All these are expensive; they require an outlay of capital which cannot be repaid by the increased income of a short period. Now, under the present law, where there is no custom or special contract to the contrary, the tenant's interest in all these improvements ends with his tenancy; and it is therefore for his advantage, towards the end of the time at any rate, not to spend money which shall benefit his landlord only, nor to leave the farm better in condition than he found it. The present system is therefore injurious to the reversioner, as well as unjust to the tenant. It is also, and to this argument your committee attach great weight, altogether opposed to public expediency, which requires that land should produce as much as it can be made to produce. A condition of the law, therefore, which has an opposite tendency, is detrimental to the community in general.

This brings your committee to the second and most important point, viz.: how far it is possible to make any general alteration in the law which shall have the effect of removing the evils complained of without giving use to other forms of injustice, or introducing great practical inconveniences. In doing this they have endeavoured to adhere strictly to the principle of equality and reciprocity between landlord and tenant already laid down by them; and they have given a prominent place to the questions, whether the landlord's remedies for injuries done to his reversion are, in the present state of the law, adequate, and whether they will continue to be so if the suggestions contained below are adopted.

The subject naturally divides itself into two parts, concerning, —

1st, Those improvements in the nature of annexations or fixtures which it is physically possible to separate and remove from the land; and,

2dly, Those improvements which are so embodied with the land as to be incapable of separation from it.

With regard to the first class of improvements, commonly called fixtures, the general rule was felt to be too severe upon the tenant at a very early period. In the reign of Edward III. doubts arose as to the tenant's right to remove a furnace; and the point was decided in his favour in the reign of Henry VII. It does not, however, appear to have been settled till long after that time to what extent the infringement on the old law should be carried, as the early decisions did not uniformly proceed on the principle now adopted. However, since the time of Lord Holt it has been considered settled law that the exception applies to fixtures erected for the purposes of trade or manufacture; and in the leading case of *Elwes v. Mawe*¹ it was most solemnly decided that it does not apply to fixtures erected for agricultural purposes only. It has been found a matter of no slight difficulty to draw the line between these two species of fixtures. In cases where the produce of land is prepared for use or sale on the land itself, the fixtures employed for that purpose obviously partake of both descriptions; and the leaning of the courts in these cases has been to construe the exception widely, in favour of the tenant. Thus a nurseryman may, though another tenant may not, remove young trees which he has planted²; whilst, on the other hand, it seems to be the better opinion, notwithstanding some sensible remarks to the contrary by Lord Kenyon³, that even a nursery-gardener may not remove hothouses or forcing-pits⁴; and a farmer certainly cannot remove a carpenter's shop or pump-house erected for the use of his farm.⁵

¹ 3 East 38.

² 2 East, 90.

³ 2 Smith's Leading Cases, 116.

⁴ 3 East, 56.

⁵ 3 East, 38.

It is clear that the distinction in question affords no satisfactory rule, and the recourse had by the courts to various other circumstances, such as custom, the intention of the tenant in erecting the fixture, the injury to the freehold occasioned by its removal, and its comparative value to the different claimants¹, shows how strongly they have felt the difficulty.² In the present day, when machinery is beginning to play so large a part in the business of a farm, this difficulty is much increased. It becomes less and less easy to tell where agriculture ends and where trade begins. Does the above exception apply to threshing or winnowing machines affixed to a building? Is a steam engine, employed for the purpose of working them, or otherwise used in preparing the produce of a farm, a trade fixture? What would be decided with respect to a mill used by the farmer to grind his own corn, or utensils employed by him in preparing or brewing from his own malt? There must be a decision upon every separate article before the law can be considered settled.

These doubts and difficulties your committee consider to be the natural result of the adoption of a fundamentally erroneous principle. They consider that, as stated above, contracts for the usufruct of land for agricultural purposes stand on precisely the same footing as similar contracts for other purposes, and that any rule which is just to the landlord as regards his trading tenant, must be also just to him as regards his agricultural tenant; they consider, also, that the farmer carries on a business no less commercial in its

¹ Amos and Ferard on Fixtures, 2d ed. pp. 44. note (f), 92.

² There is an old case strongly illustrating this difficulty, in which C. B. Comyn is said to have decided that a cider mill, deeply attached to the land, was personal property. (3 Atk. 3d ed. 13.) According to reason and the best authorities, the distinction in favour of the removal of trade fixtures does not apply in a question between heir and executor, who both claim as volunteers under a person who was the sole owner of both fixture and freehold; and on this ground the authority of the case in question has been finally overthrown by the House of Lords. (*Fisher v. Dixon*, 12 Cl. & Fin. 312.) But it had previously caused much embarrassment, and as a tenant's right of removal is much larger than that of an executor, in questions concerning the tenant's right it has long been regarded as a decision that making cider was in some measure carrying on a species of trade. Amos and Ferard on Fixtures, 2d ed. pp. 36. 53, 54. 61. 158—178.

nature, and no less beneficial to the public, than the manufacturer or merchant; and they think that the former, and the public, as interested in his success, are entitled to demand that no less protection shall be given to him than is given to the latter. Your committee are therefore of opinion that the rule laid down in *Elwes v. Mawe* ought to be altered, and that an agricultural tenant ought to possess the privilege of removing fixtures erected by him, to the same extent, at any rate, as the merchant or manufacturer. They are confirmed in this opinion by observing that Lord Ellenborough, in his very elaborate judgment in the case mentioned, founds his opinion almost entirely on authority; and, in reference to the policy of the rule, merely says, that "to hold otherwise would be to introduce a dangerous innovation into the relative rights and interests holden to subsist between landlords and tenants." Had the danger been specified, the remark might have had more weight.

Another exception to the old rule of law is made in favour of tenants in respect of some fixtures erected for the purpose of domestic convenience or of ornament. Your committee conceive that this distinction is as untenable in principle as that which is made in favour of trade fixtures; and that there is no good reason which can be adduced for not giving to a farmer the countenance which is given to the lessee of a dwelling house.

Your committee think, therefore, that farming tenants, trading tenants, manufacturing tenants, occupying tenants, and, in fact, all tenants whatsoever, ought to be placed on the same footing and have equal rights of removal. But they think further, that any alteration will be incomplete which does not go farther than the courts have hitherto gone, even in respect of trade fixtures, or of fixtures erected for the purpose of convenience or ornament. With respect to the former class, it is at least doubtful, whether a tenant would be allowed to remove a building firmly fixed into the soil, and which has never had any of the properties of a personal chattel.¹ With respect to the latter class, it is very difficult

¹ In *Thresher v. East London Waterworks Comp.*, 2 B. & C. 608., the question arose concerning a lime kiln, but was not decided.

to ascertain to what fixtures of this particular species the exception extends. Hangings and glasses, though with no wainscot behind them¹, wainscots fixed by screws, and marble chimney pieces², cupboards, stoves and fixed grates³, and a pump attached to a wall by a beam and iron pin⁴, have been considered to be removable; but it seems doubtful whether wainscot fixed with nails is removable; box edgings to flower beds, and even, it is said, flowers, are not⁵; and the same thing has been decided of a pinery and conservatory.⁶ In this last case, C. J. Dallas said, "It is clear, on the one hand, that many things of an ornamental nature may be in a degree affixed, and yet during the term may be removed; and, on the other hand, equally clear that there may be that sort of fixing or annexation which, though the thing annexed may have been merely for ornament, will yet make the removal of it waste; and that every case of this sort must depend on its own peculiar circumstances;" and similar language has been used by C. J. Tindal.⁷

The law is, therefore, as to all fixtures, unsettled and unsatisfactory. If the principle adopted by your committee is the true one, viz., that the tenant, whether farmer, merchant, manufacturer, or occupier, is a borrower, bound to return the thing lent in as good, but in no better condition than that in which he received it, it follows that in all cases he ought to be allowed to remove anything whatever which he has placed upon it so long as the removal does not put the land in a worse state than it was in at the commencement of the tenancy. He may, however, in the removal injure the property of the landlord; and for this no doubt the landlord ought to have a remedy. But your committee think that even in such cases it would be inconsistent with the principle adopted by them to allow the landlord as a general rule either to prevent the tenant by injunction from removing, or to recover the amount of damages to which he is now considered entitled. They think that he ought only to be

¹ 1 P. Wms. 94.

² 4 B. & Cr. 691.

³ 4 B. & Ad. 657.

⁴ 6 Bing. 439.

⁵ 3 Atk. 15. 1 Atk. 477. 1 H. Bl. 260.

⁶ 6 Bingh. 437.

⁷ Buckland v. Butterfield, 2 B. & B. 54.

allowed to prevent the removal where there is good reason to suppose the injury to his own reversion will be irreparable; and that when he does so, the court which grants the injunction ought to be enabled to impose such terms, as to the purchase by the landlord of the fixture, as may seem to it reasonable; and that, in cases where the removal has taken place, the measure of the landlord's damages ought to be the injury done to his reversion; *i. e.* the difference in value between the condition of the property as lent, and its condition as restored, and that it ought in no case to include the value of the addition which the tenant first makes and then takes away.

The time allowed for removal remains to be noticed. At present, if the tenant quits the premises or accepts a new holding, a presumption is raised that he intends to leave any fixtures (though removable during his tenancy), as a gift to the landlord; and the better opinion seems to be that this presumption would not be rebutted by any notice to the contrary given by the tenant.¹ This rule must often work injustice in the case of a tenant taking a new holding, as well as in the case of one who quits possession upon a sudden and unforeseen determination of the tenancy: in the former case the tenant is not likely to remove his fixtures or to take any notice of them in his new agreement: in the latter case he has no opportunity to remove. Your committee are therefore of opinion that no such presumption as that stated above ought to exist in the case of a second holding by the same tenant; and that in case of the tenant's quitting possession upon re-entry for a forfeiture by the landlord, or any other unforeseen determination of the tenancy, it ought to be capable of rebuttal by a notice given to the landlord on the determination, the right of removal being, however, to be exercised within some short fixed period.

Your committee are confirmed in these conclusions by observing that a bill introduced last session into the House of Commons by Mr. Pusey for "the Improvement of Agricultural Tenant Right in England and Wales," contained in

¹ 2 Smith's Leading Cases, 117, 118.

its original form a clause applicable to buildings, framed upon the principle of the alteration proposed above, and that in its amended form it contained one which was apparently intended to have in some degree a similar effect.

It is hardly necessary to observe, that the proposed law is not meant in any way to interfere with cases provided for by special contract.

Three objections have been made to the proposed alterations: first, that they will cause much doubt and litigation by raising questions whether the landlord's property has been injured by the removal of fixtures; secondly, that they will confer a very small boon on the tenant, as buildings and many other fixtures would generally be, when removed, of very little value; and thirdly, that they will have the effect of preventing persons from entering into special contracts. To the first of these objections some weight may at first sight be attached; but your committee think, for the reasons stated below, that removals are not likely to take place very often; and also that the doubts and disputes which are likely to arise under the proposed law, will not be nearly so numerous as those which arise from the uncertainty and anomalous character of the present law. The other two objections, your committee consider of very little weight. With regard to the second, they believe that very few removals will actually take place; otherwise there would be much ground for hesitation, since frequent removals might, in an economical point of view, be any thing but beneficial to all parties concerned. What they wish and expect may be done by giving the tenant power to remove, is to put him in a situation to make arrangements with the landlord for the sale of the erections as they stand; for, as fixtures are in general more valuable on the spot to which they are attached than on any other, the landlord, or the incoming tenant, would generally, in case of a threat of removal on the part of the tenant, be disposed to give the latter as much, or more, than he would otherwise obtain for them, and would still make an advantageous bargain for himself. The only remaining objection is founded either on an erroneous confidence in the justice of the present law of

waste, which has, in the preceding pages, been shown to be highly unjust, or on a misapprehension of the object and true character of a general rule of law. It is plain that to fulfil these it ought to do justice in the great majority of cases. Exceptional cases there always must be, in which special circumstances require other and different rules. These must be left to special contract. But the general rule is manifestly not what it ought to be, if, in the absence of special circumstances, it annexes incidents to a contract which are without special circumstances unjust; or, to use other words, such as it is not reasonable to suppose the parties to the contract to have intended. To say, that the present law as to fixtures is useful because it compels persons to enter into private contracts, is to say, that general rules ought to be unjust in order that private agreements may be complete.

The advantages to be gained from the proposed change may be summed up in a few words. The general law with respect to the removal of fixtures will be consonant to justice and the real meaning of the contract between landlord and tenant. The inequalities and anomalies arising out of the distinctions now made between different kinds of tenancies and occupations will be abolished. The doubts caused by these distinctions, and by the still unsettled limits of the infringements made upon the old law, will be removed, and the difficult question, "What is a tenant's fixture?" will be silenced. Landlords and tenants will be freed from the uncertainty as to their rights, which now not only causes disputes where there is no special contract between them, but throws considerable difficulties in the way of making such contracts. It is no slight argument in favour of the proposed alterations, that no other rule—except, perhaps, a recurrence to the strictness of the old law of waste, which cannot now be thought of—can possibly settle these questions.

It remains to be considered whether, as concerns buildings and other fixtures, the landlord has, under the present law, a sufficient remedy for injuries suffered by his property during the tenancy; for, as above stated, one of the terms of the contract between landlord and tenant is, that the latter should restore it uninjured. Your committee think that the present

law of waste sufficiently recognises and enforces this condition. Waste is of two kinds: voluntary, consisting of acts of commission in any way diminishing the value of the property, *i. e.* as to fixtures and buildings, pulling them down, removing, altering, or injuring them; and permissive, consisting of neglect to keep them in proper repair. As regards the former, there is no doubt that the law provides an ample remedy, by giving the landlord an action for damages to the extent of the injury; as to the latter, there have been decisions, or rather dicta, which have created doubts. It is, however, more consistent with the old authorities on which the law of waste is founded, and would probably now be decided, that a landlord might recover damages from a tenant for years to the extent of any injury to the premises caused by the neglect of the tenant, and damages to some, though not to so large an extent, from a tenant from year to year.¹ If the question should eventually be decided against the landlord, some legislation on the subject might be necessary in order to give him the benefit which his contract implies; but this is not to be expected, since the balance of authority as well as principle and convenience seem to be in favour of an opposite decision. There is another species of voluntary waste, which consists in so adding to the property, even by expensive erections and fixtures suffered to remain on the premises, as to alter its character or diminish its value. The remedy which the law now gives to the landlord in these cases will be in no way affected by the proposed alterations.

Under these circumstances, your committee think that the present law as to fixtures sufficiently carries out the principles above laid down so far as the tenant's duties are concerned; and that the alterations they have proposed in favour of the tenant would not render necessary any alteration in favour of the landlord beyond giving him a remedy for any injury done by the tenant in the act of removing his fixtures, as suggested above. They think, also, that their

¹ See the question discussed and the earlier authorities cited in *Amos and Ferard on Fixtures*, 279 n. 2d ed. And see also 6 C. & P. 8., 5 C. & P. 239. 7 C. & P. 327.

previous proposal, for the adoption, where practicable, of the principle that the tenant ought not to be compelled to restore the property with additions, receives strong confirmation from this recognition by the law of the corresponding principle, that he ought to restore it uninjured.

To sum up the above observations in a few words: the law of fixtures requires alteration, and the principles on which such alteration should be based are the following: —

1. Uniformity in the law, whatever the purpose of the fixture or the nature of the tenancy.

2. Recognition of the absolute right of the tenant to all fixtures erected by him and capable of removal, and of the landlord to have his original property restored uninjured.

And, to carry these principles into effect, your committee suggest:

1. That power should be given to all tenants to remove any buildings or other fixtures which they have erected.

2. That the right of removal should continue as long as possession is retained, whether under a new holding or not; and that it should terminate with the possession, except in cases where the termination of possession is sudden and unforeseen; that, in these cases, any presumption of gift should be rebutted by a notice of intention to remove given to the landlord; and that the right to remove so obtained should terminate at some short fixed period afterwards.

3. That if the property of the landlord is injured by such removal, so as to be left in a worse condition than that in which the tenant received it, the latter ought to be made liable in damages to the extent of the injury caused by the removal, and to that extent only.

4. That, in case of well-grounded apprehension of irreparable damage being caused by the removal to the property of the landlord, he should still have the right of obtaining an injunction to prevent it: power being reserved to the court which grants the injunction, to impose such terms for the purchase of the fixture by him or otherwise, as may, having regard to the principles stated above, seem proper.

ART. X. — A PLAN FOR A REGISTER OF TITLES.¹

I PROPOSE the establishment of a Register of all the lands in this country, which is to be divided into districts for this purpose, of a smaller or greater extent as may be thought most advisable. My own idea is, that these districts should follow pretty much the boundaries of the districts of the County Courts, and that the officers of those courts should, to some extent, be available for carrying on the functions of the Register. I would establish a Register in each of these districts, but I do not propose that it should be compulsory on any owner of property to register his land until some transaction respecting it took place. I would accompany the establishment of the Register by the taking of an accurate map of the whole lands in every district, which should be identified in all its particulars by numbers, but which, as to boundaries or ownership, should not be evidence until acted on, and when acted on, be only evidence against the person who so acted on it, but not as against any one else. This map, to which I shall hereafter refer, would take time to complete, but I do not propose to wait for its completion before establishing the Register, which might commence immediately, with the existing description of the lands, and such identification of the parcels as could be obtained, which might be rendered complete when the map was finished. In this way and by degrees the lands in each district would gradually get on the Register; and I think it would be only reasonable to allow persons to place their lands, after some public notice, on the Register, if they thought proper, although no dealing took place. I propose that a certain effect should attend the undisputed placing and continuance on the Register for a certain number of years. We have seen that the present law makes forty years, and, in some

¹ This article forms a part of the second lecture of Mr. James Stewart on the transfer of land, delivered on the 25th of January last; a portion of it has, we believe, been already given by some of the newspapers, but not so fully as it is here presented to our readers. We believe these Lectures will be published separately in a complete form. — En.

cases, even twenty years, adverse possession, a title against all the world. As placing a title on the Register would be a more public act than any deed can now be, I think it would be reasonable to attach to it a more stringent operation; and I should say that a person having registered his land for twenty years should hold it against all the world, giving ten years more for persons labouring under disability to make their claim. After thirty years remaining on the Register, a complete title would thus be acquired. But supposing a person had some claim to this land, I would allow him to enter this also by way of caveat. This person need not further prosecute his claim unless he wished, but no dealings with that land so claimed should take place until that caveat had been removed. But then I would protect the true owner, by imposing penalties in proportion to the value of the land, on any vexatious or frivolous claim.

I should here explain that I think it absolutely indispensable to the successful working of the plan, that at the head of each district should be placed a Person having a knowledge of the law of real property, against whose act there should be an easy appeal, and that he should regulate all the transactions within his district; and to some given number of these Registrars, say five, I would give powers of securing uniformity of practice, by issuing regulations from time to time. The form of the Register should, I think, resemble that which is contained in the model of the Belgian cadastre. It should contain the number on the map (when that was completed), the name of the proprietor, the parish and county where situated, and also the value of the land as rated to the poor's rate.

Now, Gentlemen, questions would no doubt arise, although I do not think they would be so frequent as may be supposed, as to claims to be placed on the Register. I would not oust the jurisdiction of the Superior Courts as to these matters; but if all parties chose to submit such matter to the Registrar himself, he should have power to make a final adjudication as to them. Where property lay in several districts, the decision in such cases should be made by the several Registrars of these districts, sitting together; and in all matters

not so submitted to the Registrar, his acts should be subject to appeal.

When once entered on the Register, all the dealings and transactions respecting the land, the title to which was so entered, must afterwards appear there to be valid, but with this distinction from the present practice. Our present plan perpetuates all these dealings, which have taken place, as I have said, for the last sixty years; and although they have been long discharged or wiped out, they still appear on the abstract. Thus, once a mortgage always a mortgage; and both the original deed, the various transfers that have taken place, and the reconveyance of the mortgaged land, all load the abstract. This will be *unnecessary* on the plan that I propose: as a debt is paid off, it will disappear entirely from the Register. This is the practice of many existing Registers. I find it most readily in the Prussian Register. I have here a copy of the Register. At p. 116. I find an entry of a mortgage for 12,000 dollars, and a few pages after is the discharge of a part of it, and so on. So that the exact state of the existing burdens on any part of the land may be easily shown; and that is all the purchaser wishes to know. There will be more difficulty with our settlements, for, of course, I propose no restriction as to them. The charges under them remain a long time as burdens on the land. The portions of children are not always paid off, they often allow them to remain as charges, and they are settled on marriage, and perhaps three generations must pass away before all traces of this deed can be wiped off. This doubtless would remain as at present; but it would not be at all more troublesome to produce the necessary evidence of the discharge of all claims under it. That settlements are compatible with a Register kept on this principle, is proved by that of Prussia (Proper) and other countries where the law of primogeniture obtains, and settlements on children are made. But, Gentlemen, there is no wish, of course, to transfer an estate liable to charges, except subject to those charges. The advantage of the system to which I now refer is, that under it the title works itself free; and that if there are no incumbrances, this at once appears; whereas, according to the present system, a

person so situated has as much trouble, delay, and expense in transferring his land, as a person having an incumbered estate.

One word as to the publicity, which has been always a great objection to a register. There is a celebrated declaration, made by the most eminent bankers and merchants of London, to be found in the Appendix to the Second Report of the Real Property Commissioners, in favour of the utmost publicity, and declaring their opinion that it would be of the greatest benefit. It is also found to work no inconvenience in the many countries where a Register prevails, open to the inspection of any one for a small sum of money; and in England it exists as to personal estate; for every one, for a shilling, may inspect any will that he pleases at Doctors' Commons. Still, if this be thought an insuperable objection to a Register, it must be guarded against by having the land vested in a legal owner, and a simple reference to the mortgage or settlement containing those provisions which it was thought advisable to conceal. But this is matter of detail.

Now by this plan of a Register which I propose, slowly and gradually, or, if the parties please, as quickly as they chose, all the lands of this country would get on the Register, which would ever afterwards be evidence of the title, and would, in no distant period of time, give the owner a complete title against all the world.

I may here say, Gentlemen, I trust without offence, that I greatly lament the recent alterations in the law which prevent parties, by any act of their own, acquiring a title of this kind. The period of time at which this might have been done by fine and non-claim was, I quite admit, too short, but I think it highly desirable and convenient on many occasions to give this operation to some solemn act by the owner of the estate after a certain time, say twenty years, has elapsed. The wisdom of our ancestors, which no one but a very inconsiderate person can despise, provided for thus clearing defective titles, not only by a fine, but by a feoffment, which had the effect of divesting all estates, but this operation, so far as both are concerned, has been done away with by recent acts.

So far, then, as to the plan of Registry that I propose. But there is one great practical difficulty with respect to this and all other plans of Registry. It is this: it can only come, without some violent act of the legislature, into complete operation after a considerable lapse of time. It is true that the moment the land is placed on the Register the owner gains this security—that all after-dealings with it must there appear in order to be valid, but many years must elapse,—twenty, thirty, and forty years,—before all investigation into the title, previous to the entry on the Register, can be dispensed with.

I have, indeed, seen it proposed that, in order to hasten this slow operation of a register, there should be some general examination of titles throughout the country; and it is quite true that, on the first institution of the Prussian Register in 1783, there was such an examination, extending back for forty-three years. I will not say that this would not be tolerated in England, but it certainly would excite great alarm, nor do I think we need resort to it. It would no doubt be a great thing to have all titles declared good by some formal proceeding, and thus start afresh; but in doing this, having any pretension to justice, or regard to the rights of property, you would call up many dormant, and unsubstantial, and imaginary claims to property; and in attempting to settle, you would, in fact, disturb titles to a great degree. I recommend no such course. Another plan, recommended by better authority, is, that the Registrar, before placing a title on the Register, should himself look into the title and give his opinion on it. This would be a far more practicable plan, than he, acting as a Master in Chancery, now does; but even here, if this were to be an effectual examination, it would be exceedingly difficult to quiet titles without recourse to any harsh measures towards absent parties, or calling up many questions which it would occupy much time satisfactorily to dispose of. I do not say that this latter plan would be impossible, but I think that in practice it would be attended with difficulty; nor could it fail to excite some uneasiness throughout the country.

Is it possible, then, that the benefit of the Register can

be realised immediately without these disadvantages? Can any means be devised by which a living person, wishing to buy land, shall be satisfied with the investigation which he there may make, without raking up the old title?—for that is the point to arrive at. If not, many existing owners, I fear, will look but coldly on any plan of Registry, the benefit of which is almost entirely prospective, and intended chiefly for the good of others. The doubts surrounding the question, the fears of disclosure, will press on them, and they will view, at all events, with no great desire a scheme in which no immediate benefit is offered to themselves. And yet I need not tell you, that it is by the existing owners of property that any act of Registry must be passed. Can we then satisfy this all-important class, that they may derive immediate benefit from the Register, and that it will greatly facilitate the transfer not only of the property of their successors, but of their own?

Gentlemen, I think it is possible to secure this great advantage, by a method which will enable the existing owners of property to deal with their lands without this constant retrospective deduction of title which we have found to be so tedious and expensive — which will be attended with, at least, all the safety of the present system, and be much more speedy and cheap.

Gentlemen, I have already told you that the reiterated investigation of the title usually required by the present practice is the great cause of that expense and delay and risk. Now it certainly would be of immense advantage if, in connection with a registry of the land, there were one complete and final examination of the title, which should answer once for all, and not be attended with the disadvantages I have alluded to. Mark, Gentlemen, on what security we now buy land, and lend our money on land. It is lent wholly on the faith of the counsel's opinion that "the title is a good one;" and the soundness of this opinion is found very rarely to be disproved by the result. At all events, this is the only security ever taken. Suppose, then, that after a certain time, and preparatory to being placed on the Register, the title of the lands in which a dealing was intended to be made, was

inspected by eminent counsel selected for the purpose, and that this examination was to be a final one, preparatory to being placed on the Register. This would be something. The purchaser would be informed that the examination had taken place, and that the title had been declared a good one by Mr. B. or Mr. C. Now if this had just occurred, it might very probably satisfy a purchaser under the existing system. It would, therefore, be not too much to expect that the same examination would satisfy a purchaser under any new system. But we must make sure. Now, what is the proportion of good to bad titles in this country at the present time? I have heard it stated, by experienced professional men, that for ninety-nine good titles there is only one bad. And as to this, I find a very important passage in Sir Edward Sugden's book on Vendors, who says in the last edition, "that the present expense as to titles is, in forty-nine cases out of fifty, superfluous; but as every one may be in danger, all are guarded against it. The precaution has very much increased within the last twenty years, but not from any increased danger."¹ Well, then, according to this last very high authority, one title in fifty only is bad. Now if this be so—and I believe there can be no doubt that a larger proportion than forty-nine in fifty are good—does not the principle of insurance apply? This principle, which is constantly receiving extension, and with great benefit, is founded on the fact that in a certain number of lives a certain number of deaths only will take place within a given time; or that in a certain number of houses only a certain number will be destroyed by fire; or that in a certain number of ships only a certain number will be lost; and on these calculations some of the most profitable, easily conducted, and wealthy companies and businesses in the world have been established. Now let us see whether it be not possible to extend the principle to the insurance of titles. Each of these different kinds of insurance had its battle to fight at the commencement, and do not let us reject this extension of the principle without careful inquiry. Now, I wish, in the *whole of the*

¹ Ed. 11. p. 986.

procedure that I propose, as much as possible to abide by the present practice of conveyancing, and to act according to existing rules. I will assume, then, that one of our large insurance offices, in whose means and stability the public would have perfect confidence (and no other could do it at all), was willing to undertake assurances of this nature. Let us see what would be done: One source of the profits of these companies, as we all know, is lending out their money on mortgage. They have, therefore, a machinery for examining titles; that is, they take care to employ an able and experienced solicitor and conveyancer. Now, it is on the opinion of both these gentlemen that the Company lend their money — they have no other safeguard. They advance their own money on the sole faith of this opinion; and sometimes very large sums; indeed, on one title, 100,000*l.*, 200,000*l.*, and even in a late case that came to my knowledge, 400,000*l.* on the title of one person. Now, Gentlemen, if they would lend their own money on such a security, it is most obvious that they could guarantee the payment of another person's money on a similar certificate by the professional adviser that the title was a good one. If they lent their own money on a title that turned out bad, they would assuredly lose it; and if it was another person's money, they could be no worse off, and might possibly be better. All those titles, then, that are good, are susceptible of being insured, with only a sufficient protection, by way of premium (to be paid as I shall hereafter explain), against some one title in fifty, or, as I think, a larger proportion, which might, in spite of every care, turn out bad alike under the present as under the new system. So far you will see that we have adhered to the existing practice; and there is no shock done to any favour, or, if you please, prejudice towards existing habits. But see what an advantage is gained. The person whose title has thus been approved goes with it to the Register. The title is thus insured for what the land will fetch in the market. No further examination of title is necessary: it is an insured title down to the 1st of January, 1848; and were a Register in existence, it is a registered title ever afterwards. If it remains a sufficient time on the Register, it becomes a title

against all the world, and the insurance is at an end; if, on the other hand, the purchaser has got the unlucky fiftieth title, the black sheep, and he is turned out, at all events he gets back the money that he paid.

But we have so far supposed that the title was of that class on which Insurance Societies lend their money,—that is to say, marketable titles. Let us suppose that the title, when examined, turned out not a marketable title, but only what is called a *good holding title*. Might it be also insured? Undoubtedly, because if the purchaser, although he had not what is technically called a marketable title, was not evicted, the Company would be quite safe, although here, perhaps, a higher premium might be required. Here, then, are two classes of titles, under which the great bulk of the present titles may be ranged,—marketable titles and holding titles, and for this purpose you would thus get rid of the absurd distinction. What is to be done with a third class title more or less defective? What is done now when there is a willing purchaser? An indemnity is given against the defect according to the nature of the defect. A bond or covenant or charge on other land or deposit of money. Thus the defective title is now cured. Cannot a company, acting in discharge of its proper duty, take an indemnity as well as an individual? I have thus provided for all these three usual classes of titles. And what is to be done with positively bad titles—can they be insured? Why, no; no more than the life of a man in a galloping consumption. They ought not to be transferred, and as to them, the holder has no title and ought not to be protected. But all technical blots—all that class of objections which are called “conveyancer’s crotchets,” and most of those objections which private acts of parliament are obtained to cure, could be insured against with perfect safety: there would be an end of them for ever. Now, if this were done, do you not see what a mass of technical objection which now effectually prevents the transfer of land, would be got rid of. An insured title down to a certain period, and a registered title ever afterwards, would give you indeed free trade in land, if this is what is

desired, and would, at all events, allow the real owner to do what he wanted with it.

Let us inquire, therefore, a little more in detail into the practicability of the plan. Three objects must be attended to: — the perfect solvency of the office; the reasonable profit of the office; and the regulation as to the payment of a sufficient premium, but no more.

1. The solvency of the office. Now, Gentlemen, as to this, if we were in a foreign country, I should propose that, to insure this great national object, the Government should take this responsibility; nor would it, as I am informed, be the first time that a free and important commercial state has taken a similar responsibility. I believe that in the Free City of Hamburgh, — a city closely connected with this country, — the Government takes the duty of Insurance of Titles, and it allows any citizen of that great town to borrow money on his house to the extent of one half of its value, by a very simple process. The registered owner has merely to apply to the proper office, and, without any of the expense and trouble attending our mortgage system here, he obtains the money that he wants from any person willing to lend it, and the Government to this extent insure its repayment. I need not say that this is no small convenience to the citizens of a large trading town; Nor can I see why Hamburgh is to have it and not London, Liverpool, and Manchester; and I think we have a fair right to ask Government for assistance, if we cannot otherwise get it done.

But, Gentlemen, in this country we are not in the habit of applying to the Government on these occasions. We do things for ourselves if we want them. Thus it is to individual enterprise calling into existence combined action, that we owe so many great undertakings, of which I need not remind you. It is, indeed, to the large existing companies that I, in the first place, look for aid in this matter; and if they will pay unprejudiced attention to it, I am induced to believe that this extension of the principle of insurance may safely and properly be made. There are some facts which may guide them in forming a conclusion as to it. They have themselves, according to their usual practice, lent large sums

of money on mortgage on no better security than that which I have mentioned to you — the opinion of counsel that they might safely do so. How often have they lost their money so lent? I apprehend very rarely. They may have no more money to lend in this way, but under proper guards, might not they greatly add to their profits, by insuring the money of others, which is always seeking investment by way of mortgage or on the sale of land, and taking the same precaution they now do. Again, those great undertakings, the Railways (a splendid illustration of the magnitude of success of individual enterprise in this country), have now dealt with almost all the titles in this country. These companies are satisfied with what is called a holding title, and they have great facilities granted to them as to completing a title; for if there is any unnecessary delay in this respect, they may pay the purchase money into the Bank, and this will give the company a complete title as against the persons into whose names they pay it, but not, of course, further than this. If there were other persons entitled, then they might appear, and demand to be satisfied. Now, Railways have been established about twenty years in this country, and have lately run along the length and breadth of the land, and thus dealt with nine-tenths of the whole titles of the country. How often has any railway company received any demand of this nature? This will go far to prove to you, as I said in my first lecture, that the bulk of our titles are good, — that is, good to hold, but technically bad and unmarketable, and not capable of transfer; but, according to the plan which I propose, this distinction would be at an end, because there would be no second examination of the title, and the only contingency on which the money insured could be recovered would be the eviction — the turning out of the person whose title was insured. Take also our list of causes at Westminster and in the circuits: how often does it happen that an ejectment is brought to turn out a man who has bought his land? Sometimes, undoubtedly, but very rarely. These are all great classes of facts; and if you want more, take the opinion of experienced solicitors in town and country, and they will tell you that the great mass of titles are good, although often un-

marketable; and thus we have the practical absurdity that they cannot be transferred without all this expense and delay and insecurity. Now, Gentlemen, all this convinces me that you may, when the subject is canvassed and understood, find persons and corporations of undoubted solvency to undertake this risk.

2. Next, as to the reasonable profit of the office. This, which I have already partly touched on, must be secured, or you will not get the proper persons to undertake it; and, on the other hand, you must raise a sufficient fund to meet any loss that may take place. I think there will be no difficulty in satisfying you that a sufficient fund may easily be found. I propose to raise it in the following way; but I need hardly say that if this plan were adopted, the details would most properly be left to the persons who undertook the risk. But the plan that I propose is as follows:—A person wishing to deal with his land would apply to the Insurance Company (assuming it to be established) to insure his title. His deeds would be examined in the way now done when a company lends money on mortgage. If the title was insured by the office, the deeds would be there deposited, and the owner would take a certificate to that effect to the Register Office, and the lands would be put on the Register as being an insured title, thus constituting a root or foundation of the future title. The title, which would be thus insured, would be, in many cases—1. a marketable title; but it might happen that the title was not a marketable title, but might be, 2. a good holding title; or it might be, 3. a title more or less defective.

Let it be next assumed that Sir Edward Sugden's opinion referred to is correct, and that one title only in fifty is bad. A fund of two per cent. would meet the loss which might arise; but it does not follow that it would actually happen; because the title, although really bad, might not be discovered to be so, or, if discovered, might not be proved to be bad. But in order to afford perfect security, it might be necessary to raise this fund. It is proposed then to raise it in this way: that marketable titles, as well as all others,

should pay a small percentage on the purchase or mortgage money, to be paid by the purchaser or mortgagee, in lieu of the expenses now incurred in the investigation of title. That the titles not marketable, but good holding titles, should pay a small further sum, to be paid by the vendor or mortgagor; that where a title has a positive defect or flaw, this should be insured against by a higher rate, to be paid by the vendor, or that the office should be protected by some special indemnity or deposit of the purchase or mortgage money.

This fund, then, would receive contributions for a certain period from every person who received benefit from the Register. The purchaser would be exempted from all expense of inquiry into the title, and it is fair that he should pay something in this way. As the smaller purchaser would be most benefited, it is only fair he should pay most. These dealings are always the most numerous, and this plan would, in all probability, greatly increase them. There would be payments also by the vendors, applicable to particular incumbrances, according to the state of the title. But, besides this, the fund would, in fact, rarely suffer. Say that the fiftieth title was bad, it does not follow that eviction would take place. Time would be constantly running, as against claimants. The Statutes of Limitations, and the doctrines as to presumption, would gradually establish the title against all claims. But even if a claim were established, it does not follow that the fund would suffer. If it appeared on the deeds, that the defect in the title had escaped the observations of the counsel employed, then the fund should pay; but if it arose on deeds or transactions suppressed by the vendor, or from any cause not included in the abstract, the person who received the money would have to pay in the first instance, and it would only be in the event of his failure in that, that the fund would eventually suffer, although, as against the person losing the money, the fund must pay.

3. But there is a third point to be provided for. The premiums to be charged must not be too high. Now here, gentlemen, I speak with more confidence, because these premiums, after the first examination is over, are to be in lieu

of the present large expense connected with the sale of land, and I have, therefore, more especially in small purchases of land, a wide margin. I do not think it necessary to enter into details as to the exact sum which it would be necessary to raise; but we have seen that, according to Sir E. Sugden's opinion, as to the state of our titles, two per cent. would be the most that it would be necessary to raise. Now, Gentlemen, I have already told you, that in many small purchases and mortgages the expenses amount to thirty, and even fifty per cent., and this is confirmed by the evidence taken before the Lords' Committee. Need I say how much this class of vendors and purchasers, mortgagors and mortgagees, would gain if this expense were reduced to two per cent., or even to three per cent. But if I am right in my supposition, that large profits may be made by a company undertaking this risk, I doubt not that here, as in other cases, to all those having dealings in the commodity of land, the most effectual protection to the public would be found in competition.

Now, Gentlemen, I have not proposed this change rashly. I have myself given it the utmost consideration. I have stated it to many eminent professional men, conveyancers and others. I have also consulted actuaries and others, within and out of the profession, and I have never yet heard the principle on which it rests shaken, but always confirmed. I shall be glad to hear fair and candid objections to it, and it is for the purpose of further discussion that I have thus ventured to bring it under your notice. The details would, no doubt, require a careful settlement; and the same difficulty which, in their infancy, beset the established systems of insurance, would be felt, and must be guarded against in this by a wide margin. But this principle affords a means, and, I believe, the only effectual means, except some compulsory law, as to the examination of titles, which would violate the rights of property, and be alien to our habits and practice, by which the landowners can disentangle themselves from their present enormous difficulties. This plan which I propose would be in accordance with all our established practice; and would gradually, but surely, confirm and settle every

title in the country, and give immediately a cheap and a ready mode of dealing with the land.

I have now laid before you the rough outline of the plan. Do not imagine that I suppose that it would be free from difficulties or from fraud. I can only say, that in my opinion, it would be infinitely more free from these than the present system; and that it would enable persons freely to deal with land, and that by its means we might obtain those advantages which I alluded to in my first lecture: — 1. Security of tenure; 2. Facility of transfer; 3. Certainty in point of time in all our arrangements respecting land; and, 4. A reasonable, moderate, and well-ascertained scale of expense attending our various dealings respecting it. These are what are wanted by the landowner; yes, and by the lawyer, too; for I have shown you that many members of the profession are calling for these, as necessary for carrying on their business. The plan, as I believe, would relieve the seller of land from his present difficulty and danger. 2. It would secure to the purchaser a safe title, at a small expense and in a speedy manner. And, 3. It would provide an indemnity fund for persons who might be insured, by any improper dealing, under the new system.

There are some other important points connected with the plan as to which I desire to say something more, and some other alterations which I think should accompany a Register. To these I shall hereafter advert. But before I conclude the present lecture, I wish it to be understood that, in proposing this great change, I do not hold out any hope of dispensing with the use of the lawyer in dealings with land. When the interest of the profession clashes with that of the public, it is the duty of the former to give way; but here I believe they do not clash; and it is as much the interest of the profession as of the public to promote the ready transfer of real property. I find this expressed on all sides by members of the profession, and more especially by solicitors, from many of whom I have received great assistance. I find in those countries in which registries are established on the principle for which I contend, that the professional classes who assist in dealings with land, are a rich, powerful, and

respected class. Without legal assistance I do not believe that dealings in land can be safely conducted. I have no intention, because I think I have no power, of dispensing with this assistance. But I believe the charges may be made more moderate in each particular case, and better defined and regulated according to the amount of property. But believing, as I do, that if you establish a Register on this plan there would be twenty dealings where there is now one, I am satisfied that the last person who would complain of this alteration would be the lawyer. It is not his real interest, be assured, to support a system which scares the great majority of the public from having any thing to do with the purchase of land.

SELECTION OF ADJUDGED POINTS

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II. POINTS IN EQUITY, p. 418.

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I. POINTS IN COMMON LAW.

1. Statute of Frauds — Acceptance of Goods. 2. Partnership — Authority of Partner — Agency. 3. Bill of Exchange — Post-Office — Notice of Dishonour. 4. Lease — Agreement — Stamp. 5. Railway Brokerage — Definition of Broker. 6. Bankers' Accounts — Statute of Limitations — Set off. 7. Infant — Contract — Ratification after Majority. 8. Statute of Limitations — Part Payment — New Promise. 9. Attorney — Conviction — Striking off the Roll. 10. Derby Lottery — Chose in Action — Transfer of Ticket. 11. Evidence — Seisin — Acting in Office. 12. Use and Occupation — Holding over — Terms of Tenancy. 13. Pleading — Principal and Agent. 14, 15. Guarantee — Bill of Exchange — Interest — Construction. 16. Principal and Surety — Composition-Deed. 17, 18. Divisibility of Contract — Sale of Lease and Fixtures — Restraint of Trade. 19, 20. Practice — Elegit — Official Assignee — Security for Costs.

1. FARINA v. HOME, 16 Mees. & W. 119.

Statute of Frauds — Acceptance of Goods.

By the Statute of Frauds, s. 17., no contract for the sale of goods for 10*l.* or upwards shall be valid unless (among other pro-

visions) "the buyer shall accept part of the goods, *and* actually receive the same; so that, to satisfy the statute, there must be not only a delivery to the buyer, but also an acceptance by him. In the present case the question arose, whether there had been a receipt of the *goods* by the buyer under the following circumstances, which the Court of Exchequer considered as showing only a constructive and not an actual delivery. The plaintiff was the eminent manufacturer of Eau de Cologne, in which article Home, the defendant, was a dealer in London. In July, 1845, Home verbally ordered of the plaintiff twenty-five dozen bottles, which quantity was accordingly forwarded by him to Breuchley, the defendant's shipping agent in London, who warehoused it at the wharf of one Barber, and apprised the defendant of its arrival. Barber gave Breuchley a delivery warrant, transferable by indorsement on payment of rent and charges; and Breuchley indorsed and sent the warrant to Home, who kept the warrant for ten months during which time he continually refused to pay the rent and charges,, or to return the warrant. He denied too that he had ever ordered the goods, and stated that they should remain in bond. At the trial the under sheriff left the question to the jury, whether there had been an acceptance with the intention of taking possession as owner; and the plaintiff had a verdict. A rule nisi for a new trial on the ground of misdirection having been granted, it was argued for Home, the vendee, that there was no sufficient evidence of the *actual receipt* of the goods, that is, the *delivery* of the possession of the goods by the vendor to the vendee, and the receipt of possession by the vendee; and that the delivery and receipt of the *warrant* was not in effect the same thing as the delivery and receipt of the *goods*.

Parke, B.: "We are all of that opinion. This warrant is no more than an engagement by the wharfinger to deliver to the consignee, or any one he may appoint; and the wharfinger holds the goods as the agent of the consignor (who is the vendor's agent), and his possession is that of the consignor until an assignment has taken place, and the wharfinger has attorned, so to speak, to the assignee and agreed with him to hold for him. Then, and not till then, the wharfinger is the agent or bailee of the assignee, and his possession that of the assignee, and then only is there a constructive delivery to him. In the meantime the warrant, and the indorsement of the warrant, is nothing more than an offer to hold the goods as the warehouseman of the assignee. The case is in principle the same as that of *Bentall v. Burn*, and others, which

are stated and well discussed in a recent able work of Mr. Blackburn 'On the Contract of Sale,' pp. 27. 41. 297.; and in Mr. C. Addison's Work, p. 70. We all therefore think, that though there was sufficient evidence of the acceptance, if the *goods* had been delivered to the defendant, there is none of the *receipt*, and therefore there must be a new trial."

2. BROWN v. BYERS, 16 Mees. & W. 252.

Partnership — Authority of Partners — Agency.

By the deed of association of a Mining Company, a resident manager and director was appointed, with power to hire workmen, provide machinery, and superintend the general working of the mines; with a proviso, that he should not expend or engage the credit of the Company beyond 50*l.* per month, without the written authority of three directors of the company. Byers, the resident manager, in the course of the affairs of the mine, borrowed money of a neighbouring bank, in order to pay for workmen's wages and purchase of materials, &c. For these advances he accepted bills of exchange for the directors, and *bonâ fide* applied the proceeds of the bills to the purposes of the association. He communicated to the directors the fact of his having accepted these bills; and after one or two meetings of the directors on the subject, the shareholders, at a meeting in Dec. 1842, recognised the bills: but on that occasion three of the directors were present only by proxy, and they disputed their liability in respect of the bills on the ground that Byers had no original authority to draw or accept bills, and that directors, who were present only by proxy, at the meeting which adopted the bills, were not bound by the resolution then passed for that purpose. The Court of Exchequer, under these circumstances, held that the three directors, who were not personally present at the meeting of Dec. 1842, could not be made liable for the bills without their own express authority. And, per Rolfe, B.: "There is an important distinction in this case, which ought to be strictly observed. A person who authorises the manager of a mine to pledge his credit for the purposes of the mine, gives him power to bind him, though absent. That authority, however, is a very limited one, and may be exercised without much danger of fraud or serious injury. But if we are to imply an authority to borrow money from a banker, the banker

may advance ten or twenty thousand pounds, and the party may be utterly ruined."

3. WOODCOCK v. HOULDSWORTH, 16 Mees. & W. 124.

Bill of Exchange — Post-Office — Notice of Dishonour.

In this case, the holder of a bill of exchange having duly *posted* a letter containing notice of dishonour, was held not to be prejudiced by any irregularity in the *delivery* of the letter. Parke, B.: "Notices of dishonour are generally put into the post: when that is done, although, by some mistake or delay at the post-office, the letter fails to reach its destination in proper time, the party who posted it ought not to be prejudiced: he has done all that is usual and necessary, and he does not guarantee the certainty or correctness of the post-office delivery."

4. BURTON v. REEVELL, 16 Mees. & W. 307.

Lease — Agreement — Stamp.

In July 1845, and during the operation of the statute 7 & 8 Vict. c. 76., by the fourth section of which all leases were required to be made by *deed*, an instrument was executed, which, though in form an agreement for a lease, would by the old law have been construed as an actual lease. On this instrument being tendered in evidence at the trial, with only an agreement stamp, it was objected that it was a lease which required a particular stamp under the statute 55 Geo. III., in order to be admissible in evidence. But all the Barons of the Court of Exchequer were of opinion that notwithstanding the words of the instrument imported an actual demise, yet, for want of a seal to it, the statute of Victoria reduced it to a mere agreement for a lease, so as to render an agreement stamp sufficient.

5. MILFORD v. HUGHES, 16 Mees. & W. 174.

Railway Brokerage — Definition of Broker.

The object of this action was to recover payment of the plaintiff's bill of charges for work and labour, &c., and for his commission and reward in executing the duties of a surveyor to a railway

company. The defence was by a plea, that the work done consisted of hiring and procuring workmen and others to execute the duties of the survey, and that this was brokerage, whereas the plaintiff was not a licensed broker for the city of London, where the retainer of the plaintiff took place, and where he had his office of business. The plaintiff demurred to the plea: and the Court of Exchequer gave judgment for the plaintiff, on the ground that the business in question was not that of a broker. Rolfe, B.: "It seems to me, that to make it a case of brokerage, it must relate to goods and money, and not merely to personal contracts for work and labour."

6. POTT v. CLEGG, 16 Mees. & W. 321.

Bankers' Accounts — Statute of Limitations — Set-off.

The decision in this case furnishes a parallel at law to Lord Lyndhurst's decision in equity, in *Foley v. Hill* (1 Phill. 399.), that money deposited with a banker by his customer is a *loan* from the latter to the former, subject, however, to the usage of its being payable on demand by cheque; so that if it remains for six years untouched or unclaimed, the right of the customer to repayment is barred by the Statute of Limitations. In the case before us, the assignees of a bankrupt banker brought an action against a debtor for the recovery of a sum of money. The defendant pleaded a set-off of a considerable amount, as due from the banker's estate to himself for moneys deposited by him as a customer, and never drawn out. But on proof of the account, showing that all the items were more than six years before the commencement of the action, it was held that the set-off was barred by the statute. Pollock, C.B.: "The question in this case is, how far the defendant is entitled to avail himself of an old banking account, on which a large balance has been standing for many years, and to which the Statute of Limitations would apply, under ordinary circumstances. And a question arose, whether this could be considered in any other light than an ordinary debt; there being, undoubtedly, several authorities in which it is distinctly laid down that money deposited in a banker's hands is equivalent to money lent; and the majority of the Court are of that opinion. I entirely concur in the judgment of the rest of the Court, that the set-off, in the present case, cannot be made available; for, even assuming that this account ought not to be treated as money lent, but that

there are familiar circumstances in a banking account, which distinguish it from any other, yet none of those circumstances appear on these pleadings, so as to justify us in considering the case differently from what we should do, if it were an ordinary case of money lent; and I therefore concur with the rest of the Court, that the present rule must be discharged. At the same time I must, certainly with considerable doubt and diffidence, confess the hesitation of my own opinion, whether there is not a special contract between a banker and his customer as to the money deposited, which distinguishes it from the ordinary case of a loan of money. It seems to me that is a question for the jury, who ought to decide what is the liability of the banker, and whether the money deposited with him is money lent or not. I could not concur in the judgment of the rest of the Court, without expressing this doubt, in which, however, they do not partake, as they are of opinion, that money in the hands of a banker is merely money lent, with the superadded obligation, that it is to be paid when called for, by the draft of the customer."

7. *HARRIS v. WALL*, 1 Exch. Rep. 122.

Infant — Contract — Ratification after Majority.

The defendant, being an officer in a regiment quartered in Dublin, had dealings with the plaintiff, a jeweller in that city, to whom he became indebted in the sum of 500*l.*, for which he accepted a bill of exchange drawn by the plaintiff. At this time the plaintiff was a minor; and to an action brought against him as the acceptor of the bill, some time after he attained his majority, he pleaded his infancy accordingly. To this plea the plaintiff replied, that the defendant, since he came of age, had, in writing, ratified and confirmed the contracts and promises laid in the declaration: and he gave in evidence several letters of the defendant relating to the transaction, and bearing out, in the opinion of the Court, the truth of the replication. The letters, however, were ambiguous in some of their terms, and need not be here further alluded to; the object of noticing the case being to quote an extract from the judgment of the Court, exhibiting the general principle upon which the question of ratification is, in such cases, to be determined. Rolfe, B.: "There is some difficulty, in cases like the present, in understanding, clearly, what is meant by a ratification. It is generally, as was remarked by Lord Ellen-

borough, in *Cohen v. Armstrong* (1 M. & S. 724.), more correct to say, that the infant made a new promise after he came of age. 'To say that he ratified it is an artificial inference from the fact; it is not a ratification unless done *animo ratificandi*; whereas, it is in general, only a new promise to pay.' But whatever difficulty may exist, the law clearly recognises ratification as something distinct from a new promise. Indeed, Lord Tenterden's Act (9 Geo. 4. c. 14. s. 5.), which was cited in the argument before us, expressly makes a distinction between a new promise and the ratification after majority, of the old promise made during infancy; in both cases requiring a written instrument, signed by the party. The first step, therefore, to take towards a decision of this case is, to understand, clearly, what is meant by a ratification, as distinguished from a new promise. We are of opinion (apart from Lord Tenterden's Act), that any act or declaration, which recognises the existence of the promise as binding, is a ratification of it; as in the case of agency anything which recognises as binding an act done by an agent, or by a party who has acted as agent, is an adoption of it. Any written instrument signed by the party, which, in the case of adults, would have amounted to the adoption of the act of a party acting as agent, will, in the case of an infant who has attained his majority, amount to a ratification. Applying this test to the case now before us, we think it clear that there has been a ratification."

8. *WAINMAN v. KYNMAN*, 1 Exch. Rep. 118.

Statute of Limitations — Part Payment — New Promise.

In *A'Court v. Cross* (3 Bing. 329.), where the question was, whether the mere acknowledgment of a debt was a waiver of the statute, the Court decided, that the acknowledgment must be such as to operate as a new promise. "There are many cases," said Best, C. J., "from which it may be collected, that if there be any thing said at the time of the acknowledgment to repel the inference of a promise, the acknowledgment will not take a case out of the statute." It appears, therefore, that the intention of the party and the special circumstances accompanying the acknowledgment are all to be taken into consideration by a jury as grounds for inferring, or not inferring, a new promise. On this principle, the Court of Exchequer, in the present case, held, that part-payment of a debt was not *per se* a new promise taking the case out of the

statute. The debt in question was 242*l.*, due on a promissory note; and, in the course of a conversation between the plaintiff and defendant, the latter said he owed the money, but that he would not pay it; and, on a demand for interest, he said that a sovereign was all he had, and he then gave the plaintiff a sovereign. Upon this evidence the Lord Chief Baron directed the jury, that the mere fact of part-payment was of itself conclusive to take the case out of the Statute of Limitations. Rolfe, B.: "We think that decision was undoubtedly erroneous. In order to take the case out of the statute, the circumstances must be such as to warrant the jury in inferring a promise to pay. Here there were circumstances from which such a promise might possibly have been inferred; but we think they ought to have been laid before the jury, and that the mere fact of part-payment does not necessarily take the case out of the statute. It might be that the words were spoken by the defendant in jest, and without any intention of refusing payment; but that is a question for the jury to determine. The rule will, therefore, be absolute for a new trial."

9. In the Matter of ——— GENT., ONE, &c., 8 Q. B. 129.

Attorney — Conviction — Striking off the Roll.

An attorney having been convicted of conspiracy, and sentenced to imprisonment for eighteen months, a rule was obtained to show cause why he should not be struck off the roll. He opposed the rule on the ground that he had brought a writ of error, and had succeeded in reversing the judgment, so that there was an end of the indictment. It appeared that the indictment was technically defective, and therefore could not be supported; but the verdict was not attempted to be set aside as against evidence. Lord Denman, C. J.: "The attorney in this case has been convicted of a misdemeanor; and the indictment sets forth acts amounting to very fraudulent practices. The Exchequer Chamber thought the indictment bad. We are now pressed with the argument that all done under the indictment is to be set aside. But the reversal does not interfere with the finding of the jury as to the facts. The present proceeding . . . is not a punishment for a legal crime, but an exercise of the discretion of the Court upon the question, whether a man whom they have formerly admitted is a proper person to be continued on the roll or not. . . . We think that the indictment and the verdict must be valid to the extent of

preventing the attorney from having our sanction to practise. . . . He does not deny the commission of the acts charged in the indictment. We must not, merely because the indictment is bad in point of law, shut our eyes to the fact that the jury have convicted him of conduct rendering him unfit to be an attorney." Rule absolute.

10. JONES v. CARTER, 8 Q. B. 134.

Derby Lottery — Chose in Action — Transfer of Ticket.

This case was an attempt to make a lottery ticket transferable by delivery, like a promissory note, contrary to the rule of law, which disallows the assignment of choses in action, unless under custom or mercantile usage. The plan of the lottery was that the names of all the horses were written on tickets; and he whose ticket contained the name of the winning horse was to receive the prize. One James became a subscriber, and drew a lot, which he afterwards sold and handed over to the plaintiff for five shillings. The horse named in this ticket was a winner; and a dispute having arisen about the payment of the prize, the plaintiff as assignee of James's ticket brought assumption against the defendant as treasurer of the lottery. The plaintiff contended that the defendant was under an implied agreement to hold for the person to whom James might transfer his ticket. But the learned Judge at the trial directed a nonsuit. The question as to the legality of the lottery does not appear to have been raised. Lord Denman, C. J.: "We are of opinion that the nonsuit was right, and that the plaintiff cannot recover the sum demanded, as money had and received to his use, for want of privity between him and the defendant. There is no such privity, though it is admitted that the defendant held for the benefit of the plaintiff; the defendant's liability was to the assignor. Though there may have been a valid assignment, it was of a chose in action: and the law does not permit the party interested to sue on such a transfer."

11. DOE v. YOUNG, 8 Q. B. 63.

Evidence — Seisin — Acting in Office.

To prove the seisin of Ann Hopley, under whom the lessor of the plaintiff claimed, assessments of the commissioners of land-tax were given in evidence, from which it appeared that at the time

of those assessments she was the owner of the estate. A question then arose as to the sufficiency of this evidence, on the ground that the proof given of the commissioners by whom the assessments were signed, having acted as such, referred only to a time subsequent to the signature of the assessments; and no proof of previous acting was given. This objection was disallowed by the Court of Queen's Bench. Lord Denman, C. J.: "When we have the handwriting of a person proved to have been a commissioner, is there any authority for requiring proof of his having acted as commissioner at the time when he signed? If he is shown to be a commissioner within a reasonable time from the signature, there is surely no ground of objection. . . . When persons who have exercised a public duty are shown to have done an act within the scope of that duty at a particular time, we may assume that they were exercising the public duty when they did the act, without proof that they were, or had been, discharging such duty at the very time." Coleridge, J.: "It is an admitted point, that acting in office is proof of being officer; and that rule clearly takes effect in favour of an act done after the time to which the proof relates. But the same principle applies when that time is subsequent to the act done. The inference may be carried upwards as well as downwards."

12. MAYOR OF THETFORD V. TYLER, 8 Q. B. 95.

Use and Occupation — Holding over — Terms of Tenancy.

The Red Lion Inn at Thetford was let by the corporation for seven years, ending on the 11th of Oct. 1843, at the rent of 47*l*. In Feb. 1843, the corporation advertised the premises to be let by term for ten years from the expiration of that term, and the defendant, having tendered 80*l*. rent, was accepted as the future tenant. In April, 1843, under an arrangement between him and the existing tenant, the corporation admitted the defendant immediately as tenant for the residue of the seven years' term at the rent of 47*l*. At the expiration of that term, the defendant continued to hold the premises; and disputes having arisen between him and the corporation regarding some clauses in the new lease for ten years, and that lease not having been perfected in Feb. 1844, the defendant then paid 11*l*. 15*s*. to the corporation, as a quarter's rent calculated on the terms of his holding during the seven years' term. The corporation, however, insisted upon payment of rent after the rate of 80*l*. a-year, and declared accordingly in the

present action, which was for use and occupation. The defendant contended that the case was one of those in which a party holding over is considered to hold on the terms of his original tenancy. But at the trial Mr. Baron Alderson held, that that principle did not apply, as the defendant was a stranger to the original tenancy. His Lordship, however, reserved leave to move on this point, and directed the jury to consider what was a fair rent for the defendant to be charged with. The question now was, whether this direction of the learned judge was correct; and the Court of Queen's Bench held that it was. Lord Denman, J. : "The case rests upon a principle resulting from the nature of an action for use and occupation, namely, that he who holds my premises without an express bargain, agrees to pay what a jury may find the occupation to be worth. Where a party, having held for a term at a certain rent, continues to occupy after the expiration of this term, it is presumed, if there be no evidence to the contrary, that he holds at the former rent. But, in the present case, there is so clear an indication of an intent to alter the terms, that that principle cannot apply." Wightman, J. : "When a party is allowed to hold after the expiration of a tenancy by agreement, the terms on which he continues to occupy are matter of evidence rather than of law. If there is nothing to show a different understanding, he will be considered to hold on the former terms; but here we have evidence to the contrary. The terms of the future holding were stated by an agreement anterior to the defendant's possession; he was to come in on those terms at the expiration of the tenancy then subsisting; and then, for reasons of convenience, he was let in before that tenancy expired. Under such circumstances, it was properly a question for the jury, what amount of rent was to be paid when the new holding began, the agreement not taking effect. The usual inference from the original terms of holding did not arise, and the question was left open."

13. *BARLOW v. BROWNE*, 16 Mees. & W. 126.

Pleading — Principal and Agent.

A legacy having been placed by an executor in the hands of his agent for payment to the legatee, the agent wrote to the legatee apprising him of the circumstance, and offering to remit the amount according to his instructions. In effecting the payment to the legatee, the agent performed some business, and remitted to

him the amount of legacy *minus* the charges for that business. The legatee hereupon brought an action for the difference, in the form of debt for money had and received to the plaintiff's use : but the Court of Exchequer held that the action did not lie. Parke, B. : " Here there is not the least pretence to say that the defendant has ever agreed to hold the money for the plaintiff : he is the agent of the executor, not of the plaintiff, to receive the money : nor is he a mere stakeholder ; so long as the money is in his hands, it is in the hands of the executor. There is no privity whatever between him and the plaintiff." Judgment for the defendant.

14. ACKERMANN v. EHRENSFERGER, 16 Mees. & W. 99.

Guarantee — Bill of Exchange — Interest.

The defendant had guaranteed the payment of certain bills of exchange, and the question was whether this covered the interest as well as the principal. Pollock, C. B. : " I entertain no doubt that a party who guarantees the payment of a bill is liable for all that the principal would be liable for. The defendant has guaranteed the due acceptance and payment of these bills : and as the acceptor would not have duly paid them unless he had paid both principal and interest, the same consequences must apply as to the guarantor for the acceptor : it cannot mean one thing as to the principal, and another as to the surety." Rolfe, B. : " The loss of the interest is legitimately recoverable as damages flowing from the defendant's breach of contract."

15. BERRY v. MORSE, 1 House of Lords Cases, 71.

Guarantee — Construction — Debt.

By a testamentary settlement, Dr. Berry made dispositions of property in favour of his children : and the instrument contained with reference to one son, James Anderson Berry, the following clause :— " My said trustees are hereby appointed to make payment to my said son, J. A. Berry, now residing at Bahia, of the like sum of 5000*l.* sterling : from which provision shall be deducted any sum that I have already advanced, or may still advance, for him, to enable him to carry on his business." Dr. Berry subsequently gave a guarantee for 2000*l.* for one year, in favour of the house of business in which J. A. Berry was a partner : but before the expiration of the year Dr. Berry was requested to renew

it, which he did. The house afterwards became bankrupt, and Dr. Berry was obliged to pay the sum which he had guaranteed. The question was, whether this sum was to be deducted from the bequest of 5000*l.*, under the terms of the clause above quoted from the settlement. Lord Campbell: "We have simply to see in the case what was the intention of the parties. James was to receive 5000*l.* of his father's property and no more. From that gross amount was to be deducted any sum of money, which the testator had advanced to him to enable him to carry on his business. Then has that money been advanced with that view? . . . Here is a guarantee given by the father, at the request of the son, or the benefit of the son. The son would have the benefit of this money in settling the partnership accounts: and the money may, therefore, be truly said to have been advanced to enable the son to carry on his business. The intention of the settler would be grievously disappointed by any other construction, for by it the son would get 7000*l.*, though by the terms of the will, the benefit secured to him is expressly limited to 5000*l.*" The Lord Chancellor: "What would be the difference between this and money advanced in the ordinary way I do not know. The money was advanced: the father actually paid it, and paid it in order to further the object he had in view in advancing the money, which was to enable the son to carry on his business." Judgment affirmed.

16. KEARSLEY v. COLE, 16 Mees. & W. 128.

Principal and Surety — Composition-Deed.

In composition-deeds between a debtor and his creditors it is customary to insert a clause reserving all the rights of the creditors against the sureties (if any) of the debtor, in respect of the debts thus specially secured: and it is expressly decided that where time is given to the principal debtor by a composition-deed thus framed, the surety is not discharged, as he is in common cases where time is unconditionally given. In *Ex parte* Glendinning (Buck's B. C. 517.), Lord Eldon says: "If a man by deed agree to give his principal debtor time, and in the deed expressly stipulates for the reservation of all his remedies against other persons, they shall still remain liable, notwithstanding the arrangement between the principal and the creditor; but if the creditor do not reserve his remedies, the deed will operate as a discharge to the sureties. . . . Ever since Mr. Richard Burke's case (2 Bos. & P. 61.), the law has been clearly settled, and it is now perfectly understood that

unless the creditor reserve his remedies, he discharges the surety by compounding with the principal; and the reservation must be on the face of the instrument by which the parties make the compromise." The principle of this operation of the reserve of remedies is, that it rebuts the implication of the intention to discharge the surety, who is ordinarily presumed to be exonerated by such a transaction, and it prevents the rights of the surety against the debtor from being impaired: so that if the surety be obliged at last to pay the debt, he has his remedy against the debtor, who cannot complain of that result, because he has in effect consented by the deed, that notwithstanding its provisions, the surety shall be at liberty to sue him. In the case before us it happened that Kearsley the plaintiff, being one of the creditors who were parties to a composition-deed, was himself a surety in respect of a debt due to another creditor who had executed the deed; Kearsley was afterwards called upon to pay the debt which he had guaranteed. He accordingly paid the amount: and then brought this action against Cole the principal debtor, to recover back the money so paid. Cole resisted the action on the ground that Kearsley, the surety, was discharged by the composition-deed, to which he had assented, by reason of its containing no stipulation that a surety should stand in the place of the creditor whom he had been called upon to satisfy, and consequently that Kearsley had paid the debt in his own wrong. The Court of Exchequer, however, held that Kearsley, as surety, was not originally exonerated by the composition-deed — that his assent to that deed afforded an additional reason against his discharge, — and consequently that the action well lay to recover back the money which he had paid in fulfilment of his guarantee.

17. *SLEDDON v. CRUIKSHANKS*, 16 Mees. & W. 71.

Divisibility of Contract — Sale of Lease and Fixtures.

In a lease for years, there was a stipulation that all improvements were to belong to the lessor at the end of the term, except a greenhouse, which the lessee was empowered to erect. The lessee afterwards contracted to sell the lease, and the greenhouse, which was affixed to the freehold; and he let the purchaser into possession of the greenhouse; but the lessor having refused to consent to the assignment of the lease, the lessee was unable to transfer the lease according to his contract. The separate price of the greenhouse and its contents was to be 49*l.*, for which the lessee

brought his action against the purchaser; who contended with success, that the contract for the assignment of the lease and the greenhouse was one entire and undivisible contract, and that as the defendant had not got an assignment of the lease, he had not got the whole that he bargained for, and could not be charged with the price of the greenhouse. Parke, B.: "I quite agree, and think this a very clear case. The defendant bought the greenhouse as part of the same bargain, together with an assignment of the lease. The lease has not yet been assigned, and the defendant, therefore, is not yet bound to pay for the greenhouse; he has not yet his *quid pro quo*. . . . If the defendant remove it, the case may be different: but at present, the only course is to turn him out by ejectment, unless he will come to some fresh agreement. . . . It is an entire contract, that he shall have an assignment of the lease, and a present assignment of the greenhouse, together with a right to remove it in future. Therefore, unless you can make out a new contract from subsequent circumstances, you cannot recover for the greenhouse."

18. PRICE v. GREEN, 16 Mees. & W. 346.

Restraint of Trade — Divisibility of Covenant.

It had already been decided in *Chesman v. Nainby* (1 Bro. P. C. 234.), that where the condition of a bond contained two provisions capable of separation in point of construction, the condition might be divided, so as to give effect to one stipulation, and at the same time to avoid the other. In the case before us, the question was, whether this rule was applicable to the covenant upon which the action was brought. Price and one Gosnell (Green's testator) carried on business in partnership as perfumers, &c., and by deed, Price assigned his share in the business to Gosnell for 2100*l.*; in consideration of which sum Price covenanted, that he would not, during his life, carry on the same business within the cities of London and Westminster, or either of them, or within the distance of 600 miles therefrom. The Court of Exchequer held, that this covenant was void, as an unreasonable restraint of trade, in preventing Price from setting up the same business within 600 miles from London or Westminster: but upon the construction of the covenant the Court was of opinion, that it admitted, clearly, of a division into two parts, so as to be in effect two covenants; and, therefore, after deciding the one part to be invalid, the Court

held the clause containing the restraint against trading within London or Westminster to be sustainable as a reasonable covenant, in the same manner as if the clause containing it had been found in a totally different part of the deed. Price had contended, that the covenant being bad in part, was bad altogether, and could not be cured by a separation of its clauses. But the Court declaring the covenant devisable, gave judgment against him for the penalty stipulated by the deed as liquidated damages.

19. *SHERWOOD v. CLARK*, 15 Mees. & W. 764.

Practice — Elegit — Stat. 1 & 2 Vict. c. 110.

An objection was in this case taken to the execution of a writ of elegit, on the ground that it was sued out for only part of the sum recovered by the judgment, without showing on the face of the writ that the residue of the judgment had been satisfied, or otherwise disposed of. The case was assimilated to a *fi fa*, which in *Webber v. Hutchinson* was set aside, on the ground of the mandatory part of it requiring the sheriff to levy for an amount less than the sum recovered by the judgment, without accounting for the residue: and on this authority, the Court of Exchequer allowed the objection.

Another objection to the elegit was taken on the ground that the inquisition, as returned by the sheriff, did not set out the metes and bounds of the lands extended. But this objection was overruled by the Court as not sustainable, since the passing of the statute 1 & 2 Vict. c. 110. s. 11., which enables the sheriff to extend, by elegit, the whole, and not merely (as formerly), a moiety of the defendant's lands. Platt, B.: "The received doctrine before the statute 1 Vict. c. 110. came into operation was, that the sheriff, in general, was bound to take and return an inquisition, describing the lands with convenient certainty; and, after it was taken, to deliver to the plaintiff a moiety, by metes and bounds; the object of such delivery being to define, with certainty, the portion which the plaintiff was to be entitled to hold thereafter as tenant by elegit. . . . The object of introducing metes and bounds having been to distinguish one moiety from the other, when a moiety only of the lands could be taken in execution; the 11th section of the 1 Vict. c. 110., by enabling the execution-creditor to obtain, under an elegit, possession of the whole of the execution-debtor's lands, has operated to abolish the necessity of

that distinction. Wherefore, the introduction of metes and bounds has, by that act, been rendered unnecessary."

20. *LAWSON V. BOLT*, 16 Mees. & W. 300.

Practice — Official Assignee — Security for Costs. 2

An action having been brought in the joint names of the official and other assignees of an insolvent debtor, Belcher, the official assignee, obtained a rule to show cause why all further proceedings should not be stayed until Belcher was indemnified by his co-plaintiffs, against the costs, the action having been commenced without his authority or consent. It was quite necessary that if the action were prosecuted, Belcher should be a co-plaintiff: and it was argued, that his assumption of the public office which he filled, required him to permit the use of his name without any right to the indemnity now demanded. On the other side, *Whitehead v. Hughes*, (2 Dowl. P. C. 258.), was cited as an authority for the general rule, that every person having a joint right of action, and made a plaintiff against his will, is entitled to a security for costs from the co-plaintiffs. The Court of Exchequer held, that Belcher, as official assignee, stood peculiarly within the rule of the case cited, and made the rule absolute for securing his costs.

II. POINTS IN EQUITY.

1. Jurisdiction — Lunacy — Implied Contract — Trustee. 2, 3. Solicitor and Client — Confidential Communications — Fraud — Statute of Limitations. 4. India Bonds — Injunction — Jurisdiction. 5. Mortgage — Foreclosure — Redemption. 6. Alien — Trust — Equity. 7. Conversion — Trust — Perishable Funds. 8. "Money" — Definition. 9, 10. Will — Legacy — Portions — Power — Construction. 11. Voluntary Transfer of Stock — Trust — Parent and Child. 12. Annuity — Judgment — Charge. 13. Evidence — Hearsay — Pedigree.

1. *NELSON V. DUNCOMBE*, 9 Beav. 211.

Jurisdiction — Lunacy — Implied Contract — Trustee.

The relation of a trustee towards his cestuique trust, when the latter is in a helpless and unprotected state, and without pecuniary

means for obtaining the assistance and support suitable to his rank in life, and other circumstances, appears to resemble very much the relation of a guardian towards his ward, so far as the duty extends of actively applying the property of the cestuique trust to his advantage during his disability or incapacity to watch over his own rights and interests. This duty, however, is not very clearly defined in its limits; but as the trustee can always have recourse to the Court of Chancery for his guidance in case of doubt or difficulty, the result seems to be, that he must either act upon his own responsibility, or take the directions of the Court when the path of duty is indistinct or dubious. The case before us furnishes an example of a trustee standing in a difficult position of this description, and shows the view which the Court took of his conduct under an emergency not contemplated or provided for by the instrument creating the trust.

Mr. Nelson, the plaintiff, was residuary legatee, and one of the executors of his mother, whose will was proved by Mr. Duncombe, the other residuary legatee, alone. In August, 1839, Nelson was brought before a police magistrate of London on a charge of having committed a violent breach of the peace, and was held to bail; but for want of sureties he was sent to prison, whence, with the sanction of the magistrate, and under the advice of medical men, who considered him a proper inmate of a lunatic asylum, he was, on the interference of Duncombe, transferred to such an establishment. At this time Duncombe, as executor of Mrs. Nelson, held trust funds to which Nelson was entitled, and in respect of which Duncombe had previously offered to account with Nelson, — who had taken no notice of the application; but during Nelson's confinement in the asylum, Duncombe, out of the income of these funds, defrayed the expenses of Nelson's maintenance, &c. No commission of lunacy issued, and Nelson remained so confined for five years, at the end of which time he made his escape, and filed a bill against Duncombe for an account. Shortly afterwards Duncombe sued out a commission of lunacy against Nelson, who was, upon the inquisition, found by the jury to be of sound mind. The question in the cause was, whether Duncombe was entitled to be allowed in his accounts the sums which he had expended for Nelson's maintenance and use during his confinement. Duncombe rested his claim to the allowances on the ground of his duty to afford support and protection to Nelson, who, while under confinement, was otherwise totally unprovided for; and he insisted that,

in connection with such an exercise of duty, and from the necessity of the case, the law raised an implied contract for Nelson to repay out of his property the sums thus expended. Nelson, on the other hand, contended that he had been wrongfully subjected to coercion and imprisonment for five years, and that it was unreasonable to charge him with the expenses occasioned by an improper course of proceeding. The Court, however, held Mr. Duncombe entitled to the allowances in question, not upon the ground of an implied contract, but upon the general principle of equity, that all persons who by weakness of mind are incapable of protecting their own interests, though not found lunatic by inquisition, are to be treated by the Court of Chancery as infants, and their property is to be administered as justice may require for their benefit. Lord Langdale, M. R. : "It cannot, I think, be doubted, that Mr. Duncombe, having in his hands property belonging to Mr. Nelson, out of which he might be protected and maintained, could not, consistently with his duty, remain a passive observer of Mr. Nelson's imprisonment for want of sureties. Mr. Nelson is, of course, entitled to the ordinary presumption of sanity ; and, relying upon that, he insists that everything done by Mr. Duncombe has been improperly done, contrary to his interest, and in violation of his personal rights ; and that he is in no way indebted to Mr. Duncombe for the moneys expended in prosecuting the commission, or in supporting Mr. Nelson at the Asylum. . . . On a consideration of the evidence, it does appear to me that, under the circumstances which came to the knowledge of Mr. Duncombe in August, 1839, it was his duty to interfere for the protection of Mr. Nelson, a duty of imperfect obligation, perhaps, but still a duty not to be neglected. I think that it was his duty to interfere, either by his own act, or by procuring a bill to be filed in this Court, for the purpose of obtaining directions for the application of Mr. Nelson's income for his protection and support. By applying to the Court, he might have been exempted from all but very slight risk ; by taking upon himself to interfere, without the sanction of the Court, he also took upon himself the burden of proving to the Court, if necessary, that the expenses he incurred by interference were proper to be allowed in account. I conceive that, if a proper application had been made, this Court, acting in conformity to that which Lord Eldon calls 'its habit of taking notice of persons in such a state of imbecility for their protection' (19 Ves. 283.), would have inquired in what way the income or property of Mr. Nelson, appearing to be unable to take care of and protect himself, could be

best applied for his safety and protection But whatever might have been the directions given to Mr. Duncombe or to any guardian to be appointed by the Court, I think that, under any circumstances, if Mr. Nelson (being afterwards of sound mind), availed himself of the jurisdiction of this Court to compel Mr. Duncombe to account for money in his hands, this Court would have compelled Mr. Nelson to do equity and justice on his part, and to allow all expenses properly incurred for his own protection and maintenance, at a time when he was unable to take care of himself. And if Mr. Duncombe has done no more than that which he would have been directed to do, upon the facts appearing in a suit properly instituted, can there be any good reason why, in such a case as this, he should not have the like allowance? The objection is made to the jurisdiction. It is said that, as no lunacy has been found, there can be no implied contract, and in the absence of contract, the Court has no jurisdiction to adjudicate upon the claim. It is, I think, true that in all the cases of implied contract which have been decided, there has been a lunacy actually found; but it has not been determined that this Court will not take notice of what is done, in respect of the property of persons lunatic though not so found, or that a contract may not be implied for the supply of necessaries to such persons. A bill may be filed in the name of a person alleged to be of unsound mind, though not so found by inquisition, by any one professing to be his next friend. Such a person may be sued as a defendant, and the Court appoints a guardian to answer for him; and in such cases, as Lord Eldon observes, this Court 'imposes all the restraints of infancy, and the party is bound by all the acts of the guardian' so appointed. It is thus that in cases where property in which such persons are interested is brought under the consideration of the Court, the Court being satisfied by proper evidence that they are incapable of protecting their own interests, treats them as infants or as insane, though not so found by inquisition, and being satisfied that their next friend or guardian pays proper attention to their interests, and making all such inquiries as may be necessary, to ascertain not only what their rights are, but what is beneficial to them, or, if necessary, directing that a commission may be applied for, ultimately deals with their rights and property as justice may require. When the Court goes so far, in adjudicating upon property belonging to persons deemed to be insane, though not so found by inquisition, I own that there does not seem any sufficient reason why a contract might not, if necessary, be implied in favour of a

person, who has supplied such a person with necessaries, or provided such persons with such protection and support as the legislature has sanctioned, in the absence of any finding by inquisition. But it scarcely appears to me to be necessary to resort to the doctrine of implied contract. Lord Eldon did not do so in the case of *Sherwood v. Sanderson*, in which he ordered payment of the expenses of suing out a commission of lunacy concerning a person to whom insanity was imputed, and who had been found not lunatic, but of unsound mind. This was done under the general jurisdiction of the Court in a cause, pending a traverse which prevented any exercise of jurisdiction over the property of the party 'in the matter of the lunacy.' I think that the principles and practice referred to by Lord Eldon in that case, authorise me in saying, that if a trustee is sued for an account in this Court, and it shall appear that he has properly expended sums of money for the protection and safety, or for the maintenance and support of his cestuique trust, at a time when the cestuique trust was incapable of taking care of himself, this Court will allow him credit for such sums of money."

2. PEARSE V. PEARSE, 1 De Gex & Smale, 12.

Solicitor and Client — Confidential Communications.

There is a continual struggle on the part of plaintiffs in Equity to invade or encroach upon the rule which protects a defendant from disclosing documents prepared by his solicitor, with reference to or in contemplation of the pending litigation, and from revealing communications which have passed between the defendant and his solicitor or counsel, upon the matters of the suit. The Master of the Rolls, Lord Langdale, in *Crisp v. Platel*, (8 Beav. 62.), said: "I think it would be well if every document relating to the matters in controversy were in all cases ordered to be produced." It may be useful, therefore, to direct attention to the following observations of Vice-Chancellor Bruce on the same subject: "The discovery, and vindication, and establishment of truth are main purposes, certainly, of the existence of courts of justice; still, for the obtaining of these objects, which, however valuable and important, cannot be usefully pursued without moderation, cannot be usefully or creditably pursued unfairly, or gained by unfair means, not every channel is or ought to be open to them. The practical inefficacy of torture is not, I suppose, the most

weighty objection to that mode of examination, nor probably would the purpose of the mere disclosure of truth have been otherwise than advanced by a refusal on the part of the Lord Chancellor in 1815, to act against the solicitor, who, in the cause between Lord Cholmondeley and Lord Clinton, had acted or proposed to act in the manner which Lord Eldon thought it right to prohibit. Truth, like all other good things, may be loved unwisely—may be pursued too keenly—may cost too much. And surely, the meanness and the mischief of prying into a man's confidential consultations with his legal adviser, the general evil of infusing reserve and dissimulation, uneasiness, and suspicion, and fear, into those communications which must take place, and which, unless in a condition of perfect security, must take place uselessly or worse, are too great a price to pay for truth itself."

3. BLAIR V. BROMLEY, 5 Hare, 543.

Solicitor and Client — Fraud — Statute of Limitations.

In October, 1829, two clients holding money on a joint account remitted from Devonshire to their London solicitors a cheque for 4500*l.*, to be invested by them in a mortgage. The cheque was enclosed in a letter addressed to William Bromley, one of the partners; but it was paid by him to the credit of the partnership account at the banking-house of the firm; and the cheque was duly honoured on presentment. The firm of solicitors thus had possession and control of the money. At the time of the remittance a mortgage had been obtained from one Seabrooke as an investment for the money; and a draught of the mortgage deed had been prepared; but the transaction was never completed. The business of these clients was conducted by W. Bromley alone, and he fraudulently wrote a letter to the clients, stating that the mortgage had been completed, and remitted to them from time to time the amount of interest which would have been payable on the mortgage if the investment had been effected as originally intended. In September, 1834, about five years after the remittance of the cheque, the partnership of the solicitors was dissolved, and the clients continued their dealings and correspondence with W. Bromley, who had previously managed their affairs. He carried on business separately on his own account from the time of the dissolution until his bankruptcy in 1844, and continued regu-

larly to pay the interest during that time upon the 4500*l.* in question. Upon the occurrence of the bankruptcy and not sooner, the clients for the first time discovered that their money had not been invested in a mortgage according to their instructions, but had been long since misappropriated by the bankrupt to his own use, and (as it appeared in the cause) entirely without the knowledge of his co-partner, whose integrity was unquestionable, and in no-wise impeached. Against him, however, the clients, in 1844, filed a bill to recover their money with 5 per cent. interest from the date of the last payment antecedent to the bankruptcy of the delinquent partner. This step was taken fifteen years after the original remittance of the cheque, and ten years after the defendant had dissolved his partnership with the bankrupt; and the V. C. Wigram, after full argument on both sides, made a decree for the plaintiffs—giving them their principal money with 5 per cent. interest as claimed, and all the costs of the suit. The general principle of the liability of a partner for the acts of his co-partners in matters or dealings within the scope of the partnership business, without regard to any distribution of such business among the partners *inter se*, or to their cognizance of the frauds of their co-partner, was clearly laid down by Lord Langdale, M. R., in *Sadler v. Lee* (6 Beav. 324.), and would probably have sufficed as an authority for the relief sought in the present case, had not the Statute of Limitations run against the plaintiffs so long before the commencement of their suit. The defendant, therefore, took his stand upon the Statute of Limitations as a bar to the suit: but as in equity the statute is no bar to relief against concealed fraud, the defendant contended that this rule applied only to the actual perpetrators of fraud, and that he could not be deprived of the benefit of the statute by a mere imputation of constructive fraud, in a matter with which he had not, as the plaintiffs admitted, any actual or personal concern, and in which, therefore, his conscience was not at all affected. He, under these circumstances, insisted that the case was purely legal in its nature, and ought to have been carried to a court of law. These points, however, were overruled by the Court. V. C. Wigram: "The only question is, whether the fraudulent acts of the defendant's partner are to be deemed the acts of the firm, regard being had to this, that the Statute of Limitations is a bar to the claim against the defendant personally, unless the acts of W. Bromley are to be taken as the acts of the firm. Now my opinion is that the false

representation first made by W. Bromley, that the mortgage intended to have been executed by Seabrooke was executed by him, whenever and by whatever means that representation was made, must be deemed and taken as the representation of the firm. The receipt of the money for the purpose of effecting the mortgage was undoubtedly the receipt of the firm. Upon the evidence in this case, and upon the principles of courts of justice, I must (whatever the fact may be) impute to the defendant a knowledge of that receipt, and of the purpose for which the money was received. In this state of things it was the duty of each partner to see that the mortgage was executed, and unquestionably the information given to the mortgagees that the mortgage was executed, was a representation within the scope of the duty which they had undertaken. I cannot stop short of the conclusion, that if the firm had employed an agent to do the work for the firm, the representation in question, if made by that agent, would have been the representation of the firm; and I cannot view the case less favourably for the plaintiffs, because the agent of the firm on this occasion was one of the members of the firm. I do not pursue further the question which was argued at the bar, — whether the fraudulent misrepresentation of William Bromley would affect the defendant. The onus, in the first instance, was upon the plaintiffs to prove the misrepresentation they alleged to have been made by the firm. Having proved that in the single case which I have mentioned, they have proved enough, until the defendant shows that the fraud was discovered at a time which bars the right to relief. The discovery of the fraud is not shown to have taken place until a very short period before the bill was filed. Then there is the *suggestio falsi*, which is necessary to constitute the fraud in this case, and the loss of the money in consequence of that suggestion, unless it is recoverable against the defendant. In order that my decision in this case might be placed on as broad a basis as possible, I have endeavoured to inform myself how the case would stand at law, if the plaintiffs had brought the action at law against the defendant, founded only on the receipt of the money. It is admitted that the Statute of Limitations would have been an answer to the demand. I have endeavoured to inform myself whether there was any form of action by which the plaintiffs' proceedings at law might have avoided the Statute of Limitations; and I believe I am correct when I say, there is no proceeding at law by which they could have avoided the effect of the statute — no proceeding founded solely on any distinction

arising out of the fraud. The consequence is, that the plaintiffs have lost their remedy at law, and they are remediless unless relief be given in this Court. The jurisdiction of this Court is assumed on the ground of the fraud, and the time will run only from the discovery of the fraud. I certainly feel that this is a case of great hardship on the defendant, and I must add my belief, which I partake with the counsel for the plaintiffs, that there is not the slightest ground for any moral charge against the defendant. It is on the ground of his civil liability that I am bound to decree the payment of the money, with interest and costs." (Affirmed by Lord Cottenham, C.)

4. GLASSE V. MARSHALL AND THE EAST INDIA CO. 15 Sim. 71.

India Bonds — Injunction — Jurisdiction

Where the title to the present possession of property is impeached in equity on the ground of fraud, the Court of Chancery secures or assists the recovery of the property to the rightful owner, by preventing a transfer until the right of ownership has been decided. This is one of the most beneficial powers incident to the jurisdiction of equity. Even though the property be in its nature assignable by mere delivery, as bank notes, yet, if the numbers of the notes, or the specific property into which they have been converted, can be traced, the Court will impound the notes, or lay its embargo on the property which is the fruit of them, by issuing an injunction to restrain all further dealings with the money or its produce, until the imputed fraud has been disproved. The Court of Exchequer thus acted in the case of *Small v. Attwood* (1 Younge, p. 407.), and restrained the transfer of stock, proved to have been purchased with bank notes properly identified as representing the subject of litigation. In the case before us, the Court of Chancery asserted a similar jurisdiction with respect to India bonds, which, under the Act 51 Geo. 3. c. 64. s. 4., are expressly rendered transferable by simple delivery. A motion was granted *ex parte* in the first instance, to restrain the defendant, Marshall, from transferring or parting with the India bonds in question, and from receiving the moneys thereby secured, and also to restrain the East India Company from paying the amount of the bonds to any person but the plaintiff, who claimed title to them as administrator of his late wife, who had purchased them out of the savings of her separate estate. It

appeared, that on the death of the plaintiff's wife, who lived separate from him, the defendant, Marshall, went to her house, and took possession of the bonds without the slightest colour of right or authority. A motion having been made by the defendant to dissolve this injunction, it was contended on his behalf, that, as by the act 51 Geo. 3., India bonds passed by simple delivery, they stood on the footing of bank notes payable to the holder or bearer, who, therefore, might bring an action against the Company for non-payment. No such injunction had ever been granted before; and it was argued for the Company that their securities would be greatly depreciated by the interference of the Court. But the Court held, that the injunction had been properly granted, and ought to be continued.

The V. C. of England: "As to the general right of the Court to interfere by injunction in a case like this, I have no doubt whatever. It is inherent in the Court to exercise jurisdiction in all cases of fraud; therefore it must have jurisdiction in this case, unless the words of the Act of Parliament are so precise and cogent as to take it away. I do not see anything in the Act which expressly declares that the Company shall be liable to pay their bonds, in whosoever hands they may be, or by whatsoever means they may have been obtained. The Legislature never could have intended to say, that if A. came to the East India House with bonds in his hand, and B. knocked him down and took them away, payment should be made to B. and not to A. . . . With respect to an observation made by counsel that the Finance Committee of the East India Company are apprehensive that the value of East India bonds will be depreciated, if they can be affected by an injunction of this Court, I must say, that though the Finance Committee (which, no doubt, consists of gentlemen eminently competent in matters of finance), may think that their bonds are of more value, because, in the event of their being stolen, the thief may receive the money instead of the lawful owner; yet there are other persons who may consider the bonds to be of greater value, if, by the interference of this Court, the thief may be prevented from obtaining immediate payment of them, and the money due on them may be secured for the person to whom it properly belongs." Injunction continued.

5. LOCKHART v. HARDY, 9 Beav. 349.

Mortgage — Foreclosure — Rights of Mortgagee.

This was the common case of a mortgage of lands, with the usual covenant to pay the mortgage money, which was further secured by a collateral bond. The mortgagee obtained a foreclosure, and afterwards sold the estate *bonâ fide* for a less sum than the mortgage money. The Court held, that the mortgagee was precluded from recovering the residue of the mortgage money by any proceedings upon the covenant or the bond. The claim of the mortgagee to resort to his covenant or bond was likened by the Court to a case in which the mortgage deed might happen to contain a trust for sale, with a bond or covenant *for the deficiency*. But this was declared to be by no means the effect of the ordinary mortgage bond or covenant. Though it is laid down in the books, that a mortgagee may pursue all his remedies at once, this (as it seems), is to be understood to apply only to the time during which the mortgagee has an opportunity of redemption, and when a foreclosure has been effected, the estate is accepted in satisfaction of the debt, and the debt is thereupon extinguished. An extract from the judgment of the Master of the Rolls will put this doctrine in a clear point of view. Lord Langdale, M.R. : "It is decided, that if a debt is secured by the mortgage of a real estate, and also by the covenant and by bond, the mortgagee may pursue all his remedies at the same time. If he obtains full payment on the bond or covenant, the mortgagor is, by the fact of payment, entitled to redeem the estate, and foreclosure is prevented, and not allowed. But if the mortgagee obtains only part payment on the bond or covenant, he may go on with his foreclosure suit, and giving credit, in account, for that which he has recovered on the bond or covenant, he may foreclose for non-payment of the remainder. On the other hand, if he obtains foreclosure first, and alleges that the value of the estate is not sufficient to satisfy the debt, he is not absolutely precluded from suing on the bond or covenant. But it is held, that by doing so, he gives to the mortgagor a renewed right to redeem, or, in other words, opens the foreclosure : and consequently, upon the commencement of an action against him on the bond, after foreclosure, the mortgagor may file a bill for redemption, and upon payment of the whole debt, secured by the bond, he is entitled to have the estate back again, and the securities given up ; and I conceive,

that after foreclosure, the Court will not restrain the mortgagee from suing on the bond, provided he retains the mortgaged estate in his own power, ready to be redeemed, in case the mortgagor should think fit to avail himself of the opening of the foreclosure. The question now is, whether such an action can be sustained, after the mortgagee has sold the estate, and deprived himself of the power of restoring it to the mortgagor on full payment of the whole debt. It does not seem unreasonable when the difference between the whole debt and the price of the estates, fairly sold, is all that is sought to be recovered in the action. But I apprehend that the rules as to opening the foreclosure are founded on this, that in this Court the mortgagor, if he does not pay the whole debt, may lose the whole estate, however valuable; but that if he does pay the whole debt, he is entitled to have the estate restored to him; and it seems to follow that the mortgagee, having got the estate, is not to proceed against the mortgagor for full payment if he cannot restore the estate. If this be so whilst the estate remains in his hands, how can it be altered by any separate dealing of his own with the estate, without the consent of, or any agreement with, the mortgagor? The mortgagee had by his securities a right to foreclose the mortgage; and, if he thought the estate insufficient, a further right to proceed on his personal securities, thereby giving to the mortgagor a renewed right to redeem; but when he has so dealt with the estate that the mortgagor cannot redeem, it appears to me, that he is not entitled to proceed, and that this Court would restrain him from proceeding on the personal securities."

6. *BURNEY v. MACDONALD*, 15 Sim. 6.

Alien — Trust — Equity.

We have already had occasion to notice cases in which the Court of Chancery declined to give effect to its equitable doctrines of construction merely for the purpose of creating or perfecting the title of the crown, so as to enable it to intervene for the exercise of its prerogatives (vol. v. p. 451.). In the present case, which bears upon the same doctrine, a testator devised freehold lands to four trustees, apparently for their own benefit, but in reality upon a secret trust for an alien. Three out of the four trustees being informed of the intended trust by the testator, made an acknowledgment of it by letters to him in his lifetime. The Vice-Chancellor of England held, that he could not look at the letters, either as

testamentary instruments, or as evidence of the testator's intention. They were extrinsic to the will, and signed by the devisees, and expressed, not his will, but theirs. The alien, therefore, could not come to the Court to have the alleged trust declared, nor could the Crown; for if the alien could not take, neither could the Crown. His Honour, therefore, was of opinion that he could do no more than make a declaration that the land was subject to no trust.

7. PRESTON V. MELVILLE, 15 Sim. 35.

Conversion — Trusts — Perishable Funds.

The general rule laid down in *Howe v. Lord Dartmouth* (7 Ves. 137.), and since followed in a host of other cases, is this, that where personal estate of a perishable nature (including chattels real) is bequeathed in trust for a tenant for life with remainders over, the remaindermen (in the absence of a clear intention to the contrary) are held to be as much within the bountiful intention of the testator as the tenant for life; and it becomes the duty of the executors to convert such property into money, and lay it out in Consols; so that on the expiration of the tenancy for life, the property may not only be in existence, but may pass to the remaindermen in an undiminished state of productiveness. There is frequently, however, a contest as to the interpretation of wills containing dispositions of this nature: for where the language of the testator points to a specific enjoyment of the income of the property in the form which it wears at the testator's death, the Courts will give effect to such intention, and abstain from the conversion of the fund. In the present case, the testator, Sir Robert Preston, bequeathed all his personal estate to trustees, and directed them to convert it into money, and to pay the interest to certain persons for their lives, and then to invest the principal in the purchase of lands; *it being understood, that where his money or personal estate might be lying on undoubted, real, or personal securities, such securities might be only renewed in the names of the trustees.* Part of the funds coming within the range of this bequest consisted of long annuities. The Vice-Chancellor of England held, that the special words as to the non-disturbance of money invested on good personal security did not entitle the tenant for life to receive the long annuities, and that the long annuities must be converted into Consols, according to the common rule. Decreed accordingly.

8. GLENDENING V. GLENDENING, 9 Beav. 324.

"Money" — Definition.

Per Lord Langdale, M.R. : "Consistently with the ordinary mode of expression, an extended meaning may be given to the word "money." We hear persons daily talking of their *money in the Funds*, meaning thereby perpetual government annuities, and the term *money* has acquired a popular meaning in many other like cases. I agree that if you take the word *money* by itself, it means money in its strict sense, and nothing else; but when used in connection with other words, it may have a much more extended signification. There is nothing new in that construction of the word, for in the old Roman law the word *pecunia* was held to pass property of every description."

9. KNOX V. LORD HOTHAM, 15 Sim. 82.

Legacy — Construction.

A sum of 8000*l.* having been bequeathed to a legatee *towards purchasing a country residence for her*, a question arose whether this was a trust of such a nature as to bind the executors to see to the specific application of the legacy in the manner indicated by the will. The V. C. of England : "In my opinion this is an absolute gift to [the legatee], and I shall so declare."

10. COTGREAVE V. COTGREAVE, 1 De Gex & Smale, 138.

Will — Portions — Power — Construction.

A power was given by the will of Thomas Cotgreave to the devisees for life of his estates, as and when they should successively be in possession, to charge the premises, by deed or will, with any sum or sums not exceeding in the whole 2000*l.*, for the portion or portions of *any* daughters or younger sons of the respective tenants for life. The V. C. Knight Bruce, held that, under this power, each tenant for life was entitled to direct the whole 2000*l.* to be raised, and to distribute it *unequally* among his daughters and younger sons.

11. SMITH v. WARDE, 15 Sim. 56.

Voluntary Transfer of Stock — Trust — Parent and Child.

Sir Lionel Smith, when Governor of Barbadoes, in April, 1834, directed by letter his agents in London to invest 4000*l.* in the name of Sir L. and Lady Smith in trust for their son Lionel Eldred Smith. This purchase was made in the joint names as directed, but no trust was declared, because of the objection of the Bank to have any trust accounts appear on their books. Sir Lionel was apprised of this investment, and acknowledged the communication, but took no further step in the business; and no trust of the stock was declared to the day of his death in January, 1842. The stock continued invested in the joint names of Sir Lionel and Lady Smith; and, under these circumstances, the V. C. of England held that the stock formed part of Sir Lionel's general assets, and that neither Lady Smith nor Lionel Eldred Smith had any title to the fund. His Honour's decree proceeded on the ground that Sir Lionel Smith, after receiving information of the investment, without any declaration of trust, suffered the stock to remain in that state, and so manifested his intention to retain it under his own absolute dominion.

12. HARRIS v. DAVISON, 15 Sim. 128.

Annuity — Judgment — Charge.

An annuity charged by deed upon land, and further secured by the covenant of the grantor, was held in this case to be an interest in land which might be made available in equity under the stat. 1 & 2 Vict. c. 110. s. 3. for payment of a judgment debt due from the annuitant. It will be remembered, that the third section of the act gives to a judgment creditor all such remedies against his debtor's lands, or interests in lands, as he might have had if the debtor had had power to charge, and had by writing charged the same with the amount of the judgment debt and interest. The bill in this case was filed by the judgment creditor to give effect to the statutory charge; and the Vice-Chancellor of England decreed a sale of the annuity, with directions to apply the proceeds in satisfaction of the plaintiff's claim.

13. SHIELDS v. BOUCHER, 1 De Gex & Smale, 40.

Evidence — Hearsay — Pedigree.

A question arose in this cause, whether the declarations of a

deceased member of a family, whose pedigree was under investigation, were admissible as evidence of the *place* which the family or any particular member of it came from; it being admitted as settled law that like declarations are evidence of the *time or times* at which family occurrences, such as births, marriages, &c. happened. "For such a purpose (says the V. C. Knight Bruce) is there a solid ground of distinction between time and place. . . . If a declaration be, 'I heard my wife's mother say that she had a son born *at Dublin* on Christmas-day.' . . . Is it to be received as genealogical evidence except as to the words 'at Dublin,' . . . and are those words to be substantially rejected or entirely disregarded, if they tend, or although they tend, to elucidate an obscure point in the pedigree. . . . The place might prove the time, which might be material and not otherwise proveable." In the case before us, certain issues upon points of a pedigree had been sent to be tried at law: and during the examination of a witness, who was giving evidence of the declarations of Mrs. Allen, a deceased member of the family, the following questions were disallowed by the Lord Chief Justice Wild:—"Have you heard her (meaning Mrs. Allen) say where her family came from?" "Have you heard her (meaning Mrs. Allen) say where she came from?" And (after a witness had stated his father to have said that the father's brother, who was Mrs. Allen's husband, had married Miss Hollins), "Did he say of where?" In consequence of these questions being disallowed, a motion for a new trial was made before His Honour the V. C. Knight Bruce, who delivered a most able and eloquent judgment, from which we make the following extract:—The Vice Chancellor. "Are these questions within the reason or principle upon which proof, by hearsay, of single acts, or particular facts, is excluded, so far as it is excluded, in a case of pedigree? According to my understanding of that reason or principle, so far as I have been able to collect it, I am disposed to say, rather, that neither of the three questions is within it, than that they are all within it. They seem to me to relate rather generally to the history of a life, or of a family, than particularly to a single transaction, or the doing of a single thing, and, perhaps, rather to a description or identification, or (if I may use the phrase) individuation, of a family or person under discussion, than to a history of a family or of a life. But if not impeachable for the reason or upon the principle to which I have just referred, the question still may be without the principle, or beyond the reasons, upon which hearsay evidence is admitted at all on points of pedigree.

Are they so? I confess myself not persuaded that they are. I own myself not convinced that the reasons and grounds (so far as I can collect and understand them) upon which births and times of births, marriages, deaths, legitimacy, illegitimacy, consanguinity generally, and particular degrees of consanguinity, and of affinity, are allowed to be proved by hearsay (from proper quarters) in a controversy merely genealogical, are not as applicable to interrogatories like those that have been rejected in a case like the present, as to an interrogatory whether a man's grandfather was said to be related to some other man, or in what year, or what day, or at what time, or of what parents a man was said to have been born; whether a man's mother was said to be illegitimate; whether she was said to have been married, or to have brought a child into the world before or after a marriage, or what her name was said to have been; or (to resort for an instance to one of the questions allowed to be put and answered on the trial in this case), whether it had been said 'what her father was.' Who generally is more likely to know whence a man or a family came than the man or the family? Does the emigrant living or dying forget his native soil? Is a woman less likely to state her country than her age with accuracy? In those persons also who care for the history of lineage, whom genealogy interests, local attachment, local predilection and local memory, are for the most part lively and strong; nor are there, perhaps, any recollections or traditions of the old more readily communicated, or more acceptable to an auditory of descendants, than the original seat of the family, its former residences and possessions, its migrations, its local and other distinctions of the past, its advancement or its decay. If such topics are not strictly genealogical, they are at least intimately connected with genealogy. Their exclusion, surely, from those traditions, to which the law for the very purpose of preserving the memory and proof of common ancestry and connected lineage between families, allows the force of evidence, must, as it seems to me, at least tend strongly to deprive of the law's protection cases in great number and variety, needing most peculiarly its aid, and in the most striking manner within its reason. Nor do I refer merely to such instances as those of branches from English families, planted in distant colonies; for in the same country the severance and estrangement that arise between wealth and poverty, industry and idleness, prosperity and misfortune, illustration and obscurity, vanity and humility, are

often more effectual and complete than could be the distance from Northumberland and Australia. It can scarcely, I suppose, be contended, that whenever in a statement by a deceased person of a relationship between that person and another individual, or a particular family, the residence or country of the individual or family is mentioned, the statement must, for so much, be rejected or disregarded. There might then be no identification. The statement might then be without meaning, or unintelligible, or without applicability. Let us suppose a declaration (from a proper quarter) to be given in evidence in these words: 'My father was not the person that you imagine. He was John Smith of the hill, not John Smith of the dale;' or thus, 'As my father's mother came from Suffolk she could not be the person to whom you refer;' or thus, 'My sister married a man of the same name, it is true, but he was born and bred in a parish in Berkshire, as he has often told me, and he died there.' What is the objectionable part, or the part that is to go for nothing, of either of these statements? In the present instance the sole dispute in effect was, of what John Hollins was Mrs. Allen the daughter; it being proved or conceded that she was the daughter of some John Hollins, and that the intestate had a paternal uncle called John Hollins. The theory of the defendant, if Mrs. Allen was the daughter of some John Hollins, must be, that there were at least two men, each called John Hollins. And whether the plaintiff's case is true or untrue, there may have been two or more persons of that name. Supposing that there were two or more men of that name, would a declaration by Mrs. Allen, specifying her father, and distinguishing him from the other or each of the others so called, by stating his country or residence, or that of his family, be so far rejected? And if the answer to a question allowed to be put at the trial, which I have already noticed, had been, 'She told me that her father was rather more than a farmer, that he was a country gentleman;' would it have been treated as nothing? Or had the answer been, 'She told me that her father was a Staffordshire yeoman;' would the word 'Staffordshire' have been rejected, or substantially disregarded? If Mrs. Allen had had a bible containing entries of births and marriages in her family, which would have been evidence, and it had been tendered at the trial, and found to contain a description of her father, as 'John Hollins of Kinver,' would it have been right to tell the jury to pay no attention to the two last words? As a man, or a family, may be identified, may be distinguished and discriminated from

other men, or other families by name, why not by an occupation? and why not by a residence? To say nothing of the time when surnames were not general in England, there are now-a-days in this country many men, especially those having servants, that are in habits of daily intercourse with persons, whose surnames, if any, they do not know, and, as I have heard, men who, if they have surnames, are not themselves aware of them. Nor are some illustrious painters the only persons whom many know by nicknames, and by nicknames only. Of surnames, some are exceedingly common, not in Wales merely, but in England too. In particular districts of England particular surnames frequently abound. In many parts of Wales not only is the number of surnames very limited, but, within the last half century, the surname of a family was liable to change, and often did change at every generation; nor is the custom, I believe, wholly extinct. Often, in cases such as those to which I have been referring, hearsay of relationship, without local addition, or local designation, may, I repeat, and as is obvious, be absolutely worthless. What precise notion of individuality can 'John Jones,' in Wales, or 'John Brown,' in England afford?" In consequence of the rejection of the evidence to which the foregoing observations refer, his Honour ordered a new trial.

III. POINTS IN THE LAW OF PROPERTY.

1, 2. Devise — Construction — Condition — Forfeiture — "Estate."

1. *SANDERSON v. DOBSON*, 1 Exchequer Rep. 141.

Devise — Construction — "Estate."

Though it has long been settled that the word *estate* is sufficient in a will to pass realty of every description, there are several authorities which show that the effect of that word will be restrained to personalty, if such an intention can be collected from the whole will, and that intention may be clearly evinced from the

collocation or other special circumstances connected with the use of the word. In the case before us, Thomas Stapylton, after specifically devising certain his freehold and leasehold estates, proceeded thus: "I give all the rest of my household furniture, books, linen, and china, goods, chattels, *estate* and effects unto my executors, upon trust," &c. The Court of Exchequer held that, from the combination in which the word *estate* was here found, the clause applied wholly to personalty, and did not embrace a reversion in fee, to which the testator was entitled, in certain lands at Leyburn and elsewhere, in the county of York, and of which reversion the testator had not made any specific devise or disposition by his will. Pollock, C. B.: "There is no doubt but that the word *estate*, when used in a will, is sufficient to pass real as well as personal property. A devise of *my estate* or *estates*, or *all my estate* or *estates*, *primâ facie*, carries all the devisor's property, real as well as personal; but this *primâ facie* meaning may be cut down or explained by the context; and one ground, which was relied upon for contending that the word is not meant to include real property, was, that it is associated with words indicating personal property only. This distinction, in such cases, has been made, that where the other words are sufficient of themselves to include all the personal estate, then the word *estate* shall be deemed to refer to *real estate*, as it would otherwise have no operation. But if the other words would not include all the personal estate, but only a part of it, then the word *estate* has been taken to refer to personalty only, and to have been used for the purpose of completing the otherwise imperfect enumeration of a testator's personal property. This was the principle propounded by Lord Hardwicke, in *Tilley v. Simpson* (2 T. R. 659., note). Whether the doctrine thus laid down is altogether satisfactory, we need not now determine; for if, in the present case, the word *estate* does not extend to real property, and so include the reversion in question, it must be because it is *nomen generalissimum*, comprehending every thing, real and personal, over which the testator had a disposing power. It is difficult to imagine a case in which the word *estate*, by reason of its comprehensive character, would pass real property, but would not include all the personalty. Now it is plain that, in this case, the testator did not consider that he had used the word *estate* in any sense which would include all his personalty; for, in the clause which follows next after the one in question, he disposes of an important part of his personal property, namely, his ready money, &c., treating

all these as something which he had not given by the previous clause. If therefore, the word *estate*, as here used, does not include all the personal estate, it is necessary to give it some more limited sense than that which would be its ordinary import; and this can only be done by applying the doctrine of *noscitur a sociis*, and holding that the word has reference exclusively to matters of the same nature as those with which it is associated, and so is merely in the nature of a tautologous repetition of the words *chattels* and *effects*. The ground on which we mainly rely is, that from the context it appears certain that the word *estate* was not meant to include all the personal estate; and therefore the principle on which the word is held to include real property, namely, the absolute generality of the expression, fails."

2. COOKE v. TURNER, 15 Mees. & W. 727.

Devise — Condition against disputing — Forfeiture.

The will of Sir Gregory Page Turner contained a proviso with a number of clauses of which the effect was, that if his daughter and only child and heiress at law, to whom he devised a rent-charge of 2000*l.* a-year, should dispute the validity of the will, or refuse, when required by the executors to confirm it, the dispositions thereby made in her favour should be revoked. A notion has extensively prevailed, that conditions of this nature in wills operate merely *in terrorem*, and possess no legal effect or validity. It appears, however, from the judgment of the Court of Exchequer in the present case, where the will was disputed on the ground of the insanity of the testator, who had been for the greater part of his life a declared lunatic, that such is not the law; and that the testator's daughter forfeited her rights under the will by the proceedings which she had taken for the purpose of setting it aside. Where a testator is of "sound and disposing mind, memory, and understanding," a will, however capricious or in some senses unreasonable it may be, has an original validity or vitality, which may possibly extend to support a condition of the nature in question. But, where the contention, as in the case before us, of a testator found lunatic by inquisition, involves the previous question, as it may be termed, whether the testator was legally competent to make any will at all, it is difficult to see the logical propriety of any decision which, on penalty of forfeiture, should

in such a case exclude the heir-at-law from contesting the validity of such an instrument, whatever be its terms or provisions. The following extract from the judgment of the Court will show the grounds of the decision under consideration. Rolfe, B.: "There appears no more reason why a person may not be restrained by a condition from disputing sanity, than from disputing any other doubtful question of fact or law, on which the title of a devisee or grantee may depend. In *Stapilton v. Stapilton* (1 Atk. 2.), a father being entitled to estates for ninety-nine years, if he should so long live, with remainder after his decease to his first and other sons successively in tail, and having two sons, concurred with them in an arrangement for cutting off the entail, and settling the estates in equal moieties on his two sons. While the matter was in progress and before its final completion, the eldest son died, and his infant child having filed a bill to compel a completion of the arrangement, the defendant, the second son, by his answer, objected that his eldest brother was in fact a bastard, and so he insisted that the proposed arrangement was not binding; but Lord Hardwicke held the agreement good, and compelled the second son to concur in all acts necessary for vesting a moiety of the property in the plaintiff. Now, a proviso good by way of contract, must also be valid by way of condition; and therefore it seems to us to follow, as a necessary corollary from that case, that if A., having succeeded to real property as heir of his father, should devise it partly to a stranger, and partly to B., his next brother, subject, as to the gift of B., to a proviso defeating his estate in case he should dispute his (A.'s) legitimacy, such a proviso would be perfectly good, and yet such a condition would, if we were to adopt the defendant's reasoning in this case, be void as infringing the liberty of the law. It would prevent or tend to prevent B. from contesting A.'s legitimacy, and it is surely as much against the policy of the law that an heir should be disinherited by an illegitimate child, as by a party claiming under the will of a non compos. The same principle applies to the case of a proviso restraining a devisee from litigating some doubtful question of law. The truth is, that in none of these cases is there any policy of the law on the one side or the other. The conditions said to be void, as trenching on the liberty of the law, are those which restrain a party from doing some act, which it is supposed the state has or may have an interest to have done. The state, from obvious causes, is interested that its subjects should

marry; and therefore it will not in general allow parties, by contract or by condition in a will, to make the continuance of an estate depend on the owner not doing that which it is or may be the interest of the state that he should do. So, the state is interested in having its subjects embarked in trade or agriculture, and therefore will not allow a condition defeating an estate, in case its owner should engage in commerce, or should plough his arable land, or the like. The principle on which such conditions are void, is analogous to that on which conditions defeating an estate, unless the owner commits a crime, are void. In the latter case, the condition has a tendency to the violation of a positive duty; in the former, to prevent the performance of what partakes of the character of a duty of imperfect obligation. But, in the case of a condition such as that before us, the state has no interest whatever apart from the interest of the parties themselves. There is no duty on the part of an heir, whether of perfect or imperfect obligation, to contest his ancestor's sanity. It matters not to the state whether the land is enjoyed by the heir or the devisee; and we conceive, therefore, that the law leaves the parties to make just what contracts and what arrangements they may think expedient, as to the raising or not raising questions of law or fact among one another, the sole result of which is to give the enjoyment of property to one claimant rather than another. The question—whether this proviso is a proviso void, as being contrary to the policy of the law, may be well tested by considering how the case would have stood, if, instead of a condition subsequent, it had been made, as in substance it might have been made, a condition precedent. Suppose the testator had said, in case my daughter and her husband shall execute all deeds necessary for settling my estates in manner hereinafter mentioned, then I give her, &c.; surely there would be no doubt of the validity of such a condition, as a condition precedent; and if so, it must be good as a condition subsequent; for where a condition is bad on grounds of public policy, it must obviously be bad whether it be precedent or subsequent. The law will no more allow anything contrary to public policy to be made the means whereby a party shall entitle himself to an estate, than whereby he shall be made to lose that of which he is already in possession."

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NOTE TO ART. X.

As the last sheets of this Number were passing through the press, we received a work called "the Condition and Prospects of Ireland, and the Evils arising from the present Distribution of landed Property, with Suggestions for a Remedy, by Jonathan Pim," published by Hodges and Smith, Dublin. We have only time to refer to it as supporting all the recommendations which have been made in this work with respect to a great change in the present system of conveyancing, more especially so far as Ireland is concerned. We hope to be able to return to this book. In the mean time we may say, that it is published "with a view of showing the evils of large incumbered estates, the necessity of such alterations in the laws as may give security and simplicity of titles, may facilitate and cheapen the means of transfer, may free the land from the various restrictions which interfere with its transfer, and may permit its sale to those who possess the capital indispensable for that purpose." We need not remind our readers, that in all these objects we cordially concur; and Mr. Pim, who, we believe, is a member of the Society of Friends, informs us in a letter that he is the author of a pamphlet on this subject, favourably noticed by us in the 10th Article of our 10th Number, and that the subject has for some time engaged his attention.

POSTSCRIPT.

ON the 20th of December, the last day on which Parliament met previous to the adjournment for the holidays, Lord Brougham renewed his motion for a copy of the Real Property Commission, ordered on his motion in June last. He said that he must state to the House the objects of that Commission. It had been issued in compliance with a report of the Burthens on Lands Committee; that committee had examined many witnesses upon a most important subject, the burthens to which the owners of land, and those who would so become owners, were subjected by the defective state of the laws regulating the transmission of property by conveyance. The whole labours of the committee were highly important; but by far the most valuable result of their labours, was the body of evidence which the committee had collected upon the state of the law and the injurious tendency of its defects. Grounded upon this evidence were the recommendations of the committee, and it related to four separate heads:—first, the improvement of the law of real property; secondly, the simplification of titles; thirdly, the shortening, and generally the improving of the forms of deeds; fourthly, the establishment of a general registry. Now he (Lord Brougham) had not of course seen the Commission, a copy of which he had moved for, but which from some accident had not been yet presented; but he had occasion to know the substance of the Commission from those who had access to it, and its objects were not the four which he had described as recommended by the committee, but only the two last,—the forms of deeds and the registry. No one was more ready than himself to admit the great importance of these two heads; indeed, he had already carried two important bills upon the first of these two, for shortening and simplifying conveyances and leases, and had introduced a more general measure, which stood over for the consideration of the Commission. But he believed he spoke the general sense of those who were anxious for the amendment of the law, and he might add, of the commissioners themselves, when he expressed his regret that the two first of the committee's recommendations had not also been adopted, and that the inquiries of the Commission had been confined to the two last. Indeed, it would be found practically to be impossible that the Commission should satisfactorily execute its duties with respect to the forms of deeds and the establishment of a registry, without having the power of inquiring into the law of real property and the simplification of titles. He trusted that his noble friends opposite would, during the recess, accede to this recommendation, with the invaluable assistance of his noble and learned friend, unfortunately absent from illness, but whose improved health, he rejoiced to say, gave a prospect of his speedily attending to this important subject, and that the defects in the Commission would be supplied by an extension of its powers. Nor was this the only subject relating to the amendment of the law that called for their attention. He found it had in some quarters been supposed, that because in giving his late notice of

again introducing the bill for enacting a digest or code of the Criminal Law, he had given no notice of renewing other measures of legislative improvement, the mention of one excluded the rest ; on the contrary, it was his intention to bring forward the other measures also, but he felt unwilling to crowd the book with general notices, because, when he gave one, it was always specific and intended to be really followed up ; he therefore abstained now from doing more than broaching two subjects which seemed not to admit of delay, because the Government could of itself act, and act efficaciously, respecting both, and therefore he wished to point their attention towards these subjects, in order that during the approaching recess some progress might be made in dealing with them. The first, and in his view one of the most important that could occupy the attention of the community, was that which he had at the close of the last session brought before their lordships, he meant the bribery practised at elections. He hoped the Government would also turn their attention, before Parliament again assembled, to another subject, and it was the last he should now mention. He meant the necessity of a department or board for the preparation of bills to be submitted to Parliament ; not, of course, to preclude any one who chooses it from preparing his own draught, but to help the Government, and to help the Parliament, and to help individuals if they choose it, and to give us some chance of having our laws framed consistently, clearly, uniformly, and upon a system, instead of each department and each individual using his own language, and all leaving to the courts of law the labour of construing unconstruable acts, and to the subject, of being governed by unintelligible laws. This was a subject of the greatest moment. As often as he had called their lordships' attention to it, so often had he experienced the most unhesitating and universal acquiescence in his opinion ; yet nothing had been done by any government to remedy the defect which all either complained of or acknowledged. The Law Amendment Society, of which he had, though unworthy, the honour to be president, had presented a report upon this important subject, above two years ago, to Sir R. Peel, then minister, and Lord Lyndhurst, then lord chancellor, and by both the proposition had been, he believed, favourably received : he ventured now to renew the proposition, because the time was favourable to its reception, not only from the circumstances he had already adverted to, but from the accident that the place of government counsel for drawing bills, was vacant. He trusted the opportunity would be immediately taken of appointing a board for the important purpose in question, the functions being such as must of necessity be exercised by a board, if there was any intention that they should be performed with any prospect of advantage to the Parliament and the country.

We may notice, in connection with the recent Conveyancing Acts alluded to by Lord Brougham, that the acts 8 & 9 Vict. c. 119. and c. 124., for shortening the forms of conveyances and leases, have been re-enacted in New South Wales ; so that if they are not liked by the profession on this side of the globe, it would seem that they are to have a trial on the other. It is yet hardly time to be able to know to what extent they have been adopted in this country. They begin, however, to appear occasionally in abstracts.

It gives us great pleasure to perceive the increasing interest that is taken in the amendment of the law. This is best shown by the constant reference in public journals to many subjects which were until lately hardly ever noticed. This is confined to no portion of the press ; but we observe that those works which are in the

largest circulation, find it necessary to pay the greatest attention to the general subject, thus plainly showing that their readers require it. Thus we find that in each succeeding number of the *Edinburgh* and *Quarterly Reviews*, a greater space is devoted to articles of this nature. We have already noticed one of the articles in the last *Edinburgh Review* as to one point. (See *antè*, p. 358.) Another sound observation relates to the duty of the Government in beginning measures for improving the law. It is justly remarked that public opinion is more important as an index to the existence of costs, than as a guide to the remedy. The calm judgment and the enlarged views of statesmen are more to be relied on for the measures required to correct existing mischief and prevent its dangerous consequences. Of course all such measures must be framed to a certain degree in accordance with the enlightened opinions of the people. But these opinions may be guided by the statesman as well as they may react upon his conduct.

A third remark of the same journal relates to the codification or digesting of the Criminal Law. "The superstitious terror (it is said) with which a code used to be regarded as something foreign and dangerous, has nearly given way, among the Bar and the public, to a more enlightened view of the advantages of legislative simplicity and order." (p. 160.) But in speaking of the Criminal Code Bill of 1844, there seems to us to be a considerable error committed. To discuss such a bill or code article by article, it is said, would be simply impossible, and therefore it can only be carried through Parliament by a departure from the ordinary mode of discussion. We believe, on the contrary, that a full discussion in a Committee of the Upper House, could easily be gone through during half a session. There being no changes proposed in the existing law, but merely a digest of it, the only question would be, whether or not any given article clearly and correctly expressed the existing law. The Commons would no doubt be satisfied with the result of the discussion in the Lords. It may, indeed, be added, that though the passing of such a bill is most desirable, yet even if it only were to pass through the Upper House, the country would ever after regard the bill as the code.

The last observation of the article to which we shall advert, concerns capital punishments and transportation. On the former, we entirely agree with the Review, that enough has been done in mitigation of punishment. On the anomalous practice still pursued of sentencing to transportation when imprisonment alone is to be inflicted, there is only a doubt expressed, and as we have more than once had occasion to show, nothing can be more clear than that this is contrary to all principle, indeed, contrary to law. The remarks on trial by jury with which this portion of the article is mixed up, are to a certain extent well founded, though we wish there had not been introduced the erroneous statement (erroneous at least from being left unguarded by explanation) that matters of law (p. 161.) are disposed of by general verdicts.

We should have felt it our duty to notice the observations of our contemporary respecting the Incumbered Estate Bill of last session, but that we understand that this subject is now under the consideration of the Government, and that this Bill will be presented in a very different shape from that which it had assumed when it was withdrawn. Our wish is not to thwart or embarrass the Government but to assist them, because we are satisfied that they desire to do well. We abstain, therefore, from further comment until we see the new Bill. The bolder the course they take in this subject the better.

These two eminent journals, the *Edinburgh* and *Quarterly Reviews*, may render much service to the great cause of legal improvement, by dealing with such questions, regardless of party or personal considerations. The conductors of such works are never safe from falling into great errors, take what pains they may to keep right; but we are exceedingly sorry to see on one or two late occasions, a tendency in the *Quarterly Review* towards illiberality in this respect, which is the more remarkable, as it has hitherto been the systematic opponent of constitutional changes, but has always supported the most extensive reforms in the law; and to this it owes, among other things, its strong hold upon the country.

We cannot but again strongly express a wish that there was some authority recognised by the Bar, for settling all disputes and difficulties connected with it. A very uneasy feeling appears to us to be growing up between the public and the profession, which we regret the more, because in most of the cases under discussion, we believe that the public is right and the profession wrong. But this subject deserves the careful consideration, which we shall endeavour to give it. In the meantime we may observe, that the discipline of the Bar is intrusted to the Inns of Court, and that on them it lies to preserve the honour of the profession.

We are glad to learn that, following the example of Lincoln's Inn, the Society of Gray's Inn is about to institute a general examination of the Real Property students, but we are not aware that it is intended to have the same effect.

It is our painful duty to record the death of Mr. Duckworth. He was an able, pains-taking, and impartial Master. He had been one of the Real Property Commissioners. Mr. Tinney has succeeded to the vacant Mastership.

January 27. 1848.

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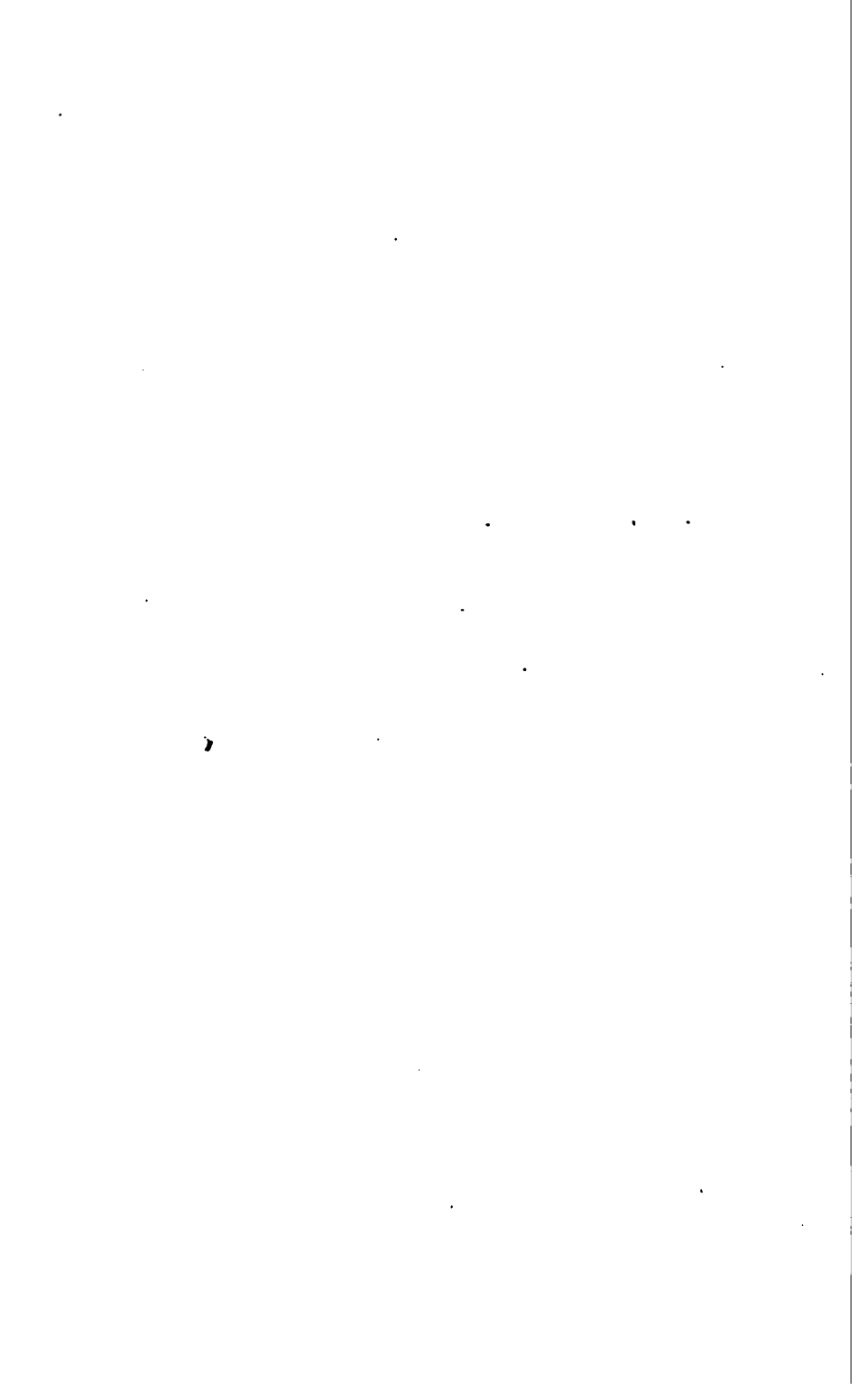
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